Office - Supreme Court, U S
FILED
JUN 14 1984
ALEXANDER L. STEVAS
CLERK

83 - 2052

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN & MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners
* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit erred in holding that terrorism, torture, hostage-taking and summary execution do not violate the "law of nations" within the meaning of the Alien Tort Claims Act, 28 U.S.C. § 1350, thereby conflicting with the Second Circuit's decision, construing section 1350, that torture does violate the "law of nations" and further conflicting with the requirement of this Court and the Second Circuit that international law be defined by the "general assent of civilized nations."

2. Whether the Alien Tort Claims Act, 28 U.S.C. § 1350, fails to provide a cause of action for injuries suffered as a result of tortious actions in violation of the "law of nations" but requires aliens to identify an explicit grant of a cause of action separate and apart from the statute itself, an interpretation which conflicts with that of the Second Circuit and which would nullify the "law of nations" portion of the statute.

3. Whether a suit seeking damages under 28 U.S.C. §§ 1331 and 1350 for injuries suffered as a result of state-sponsored acts of terrorism, torture, hostage-taking and summary execution is necessarily nonjusticiable because of the political question doctrine, a conclusion which conflicts with prior decisions of this Court and the Second Circuit.

4. Whether the District of Columbia Circuit erred in holding that petitioners who are United States citizens do not have causes of action arising under "treaties of the United States" within the meaning of 28 U.S.C. § 1331 for injuries suffered as a result of state-sponsored acts of terrorism, torture, hostage-taking and summary execution, thereby conflicting with prior decisions of this Court and the Ninth Circuit.

PARTIES

The caption does not reflect the names of the following petitioners: Sharona Tel-Oren; Adiel Tel-Oren; Reviva Tel-Oren; Nir Tel-Oren; Joseph Hochman, individually and in his representative capacity; Monique Enekave, individually and in her representative capacity; Tal Enekave; Anat Enekave; Adina Haloune, individually and in her representative capacity; Tamar Elefand, individually and in her representative capacity; Ronit Elefand; Maya Susinsky Schur, individually and in her representative capacity; Eliezer Kroytatro; Issac Amir; Ettel Sacherbrot; Isaac Mishkal, individually and in his representative capacity; Rachel Mishkal; Ruth Mishkal; Joseph Hadany, individually and in his representative capacity; Levana Hadany; Ayelet Hadany; Simacha Gal-On, individually and in his representative capacity; Shoshana Gal-On; Idan Gal-On; Lily Glottman, individually and in her representative capacity; Anat Glottman; Ilan Glottman; Carmela Rosner, individually and in her representative capacity; Mordechai Shefer; Tova Aharonovits, individually and in her representative capacity; Gideon Haas; Miriam Haas; Michelle Haas; Tal Haas; Schlomo Zait, individually and in his representative capacity; Ruth Drory, individually and in her representative capacity; Michael Drory; Ayelet Drory; Albert Ashkenazi, individually and in his representative capacity; Yechiel Leibovici, in his representative capacity; Manashe Malca; Eve Malca; Abraham Shamir; Iris Shamir; Ayelet Shamir; Esther Menashrov, in her representative capacity; Jacob Besterman, in his representative capacity; Simon Segev, in his representative capacity; Judith Eshet, in her representative capacity; Isaac Vachs; Nessa Schwarz; Joseph Savechnik; Ella Savechnik; Abraham Perets; Judith Zait; Gabriel Zait; Yfaat Zait; Alexander Jaacobi; Ella Jaacobi; Oded Jaacobi; Uzy Aviasaf; Bruria Aviasaf;

Michelle Aviasaf; Esther Aviasaf; Bilhah Sela; Alegra Cohen, in her representative capacity; and Joseph Polak, individually and in his representative capacity.

The caption does not reflect the names of the following respondents: National Association of Arab Americans, Palestine Liberation Organization and Palestine Information Office.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	11
I. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER ALIENS ARE TO BE DENIED REDRESS UNDER THE LAWS OF THE UNITED STATES FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION, AND TO RESOLVE THE CONFLICT BETWEEN THE DISTRICT OF COLUMBIA AND SECOND CIRCUITS ON THIS ISSUE	11
A. Requiring Identification of a Right to Sue Separate and Apart from Section 1350 Nullifies the "Law of Nations" Portion of the Statute, Eliminates it as a Means of Redress and is Contrary to the Express and Unambiguous Language of the Statute	13
B. Limiting the Prohibitions of the Law of Nations to Acts Unanimously Condemned by all Nation-States Denies Redress to Victims of Acts Prohibited by the Community of Nations, Renders the Law of Nations Meaningless as a Mechanism for Governing the Conduct of Nation-States and Eradicates Customary International Law from United States Law	18

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER REDRESS FOR STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION IS TO BE DENIED BECAUSE OF THE POLITICAL QUESTION DOCTRINE 23

III. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER PETITIONERS WHO ARE UNITED STATES CITIZENS ARE TO BE DENIED REDRESS UNDER 28 U.S.C. § 1331 FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION..... 27

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Cases: Page

Asakura v. City of Seattle, 265 U.S. 332 (1924) 27
Baker v. Carr, 369 U.S. 186 (1962) 23, 24, 25, 27
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 25
Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 12
Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) 6
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 27
Ex Parte Quirin, 317 U.S. 1 (1942) 25
Ex Parte Young, 209 U.S. 123 (1908) 18
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) .....*passim*
Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D. N.Y. 1984) 11
Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977) 6
Goldwater v. Carter, 444 U.S. 996 (1979) 24
Head Money Cases, 112 U.S. 580 (1884) 27, 28
Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) 16, 29
INS v. Chadha, —— U.S. ——, 103 S.Ct. 2764 (1983) 27
ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).. 12
Khedivial Line, S.A.E. v. Seafarers' International Union, 278 F.2d 49 (2d Cir. 1960) 12
Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) 12
Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) 16
People of Saipan v. United States Department of Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) 29
Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981).. 6
The Paquete Habana, 175 U.S. 677 (1900) 19, 20, 23, 25

TABLE OF AUTHORITIES—Continued

	Page
United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)	19
Valanga v. Metropolitan Life Insurance Co., 259 F. Supp. 324 (E.D. Pa. 1966)	16
Statutes:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1330	5
28 U.S.C. § 1331	*passim*
28 U.S.C. § 1332	5
28 U.S.C. § 1350	*passim*
28 U.S.C. §§ 1602-1611	5, 17, 18
Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73 (1789)	11, 29
Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470	15
Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869	15
D.C. Code Ann. § 12-301(4)	6
D.C. Code Ann. § 12-301(8)	6
D.C. Code Ann. § 12-302	6
Miscellaneous:	
Amicus Curiae Brief for the United States in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)	15, 21, 26
4 *Blackstone's Commentaries* 67 (Welsby ed. 1854)	14
Blum and Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 52 (1981)	19
Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539	28
Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403	28
Council of Europe Committee on Ministers Resolution 74(3) on International Terrorism, 1974 Eur. Y. B. 387 (Council of Europe), *reprinted in* 13 Int'l Legal Materials 471 (1974)	20

TABLE OF AUTHORITIES—Continued

	Page
Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1970)	7, 8
Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1117 (1970)	20
European Convention on the Suppression of Terrorism, Eur. T.S. No. 90, 15 Int'l Legal Materials 1972 (1976), U.K.T.S. No. 93 (1978)	21
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287	22, 28
Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135	28
Henkin, *Foreign Affairs and the Constitution* (1972)	14
7 Hudson, International Legislation, 862 L. of N. Off. J., Jan. 1938	20
International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) 245, *reprinted in* 18 Int'l Legal Materials 1457 (1979)	21, 22
Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. 236 (1982)	21
O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1250 (1970)	20
26 Op. Att'y Gen. 250 (1907)	14, 15
Restatement of the Law of Foreign Relations (Revised) § 702 (Tent. Draft No. 3, 1982)	21
U.N. Charter arts. 1 and 2, June 26, 1945, 59 Stat. 1031, T.S. No. 993	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ———

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Hanoch Tel-Oren, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 3, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 726 F.2d 774 and appears in the Appendix at 1a to 114a. The opinion of the United States District Court for the District of Columbia is officially reported at 517 F. Supp. 542 and appears in the Appendix at 115a to 130a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1984. Petition for rehearing and suggestion for rehearing *en banc* were denied on March 19, 1984. This petition is filed within ninety (90) days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1331, Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Section 1350, Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

A. Material Facts

Petitioners are a group of American, Israeli and Dutch citizens who were themselves injured and/or sue as representatives of persons murdered in a terrorist attack in Israel on March 11, 1978. In that attack, thirteen heavily-armed members of the Palestine Liberation Organization ("PLO"), acting under the direction of, and in conspiracy with, the Libyan Arab Republic ("Libya"), landed by boat near the civilian Haifa-Tel Aviv Highway with the intention of taking civilians hostage in order to extort the release of certain PLO terrorists in Israeli jails. In accordance with their instructions, the terrorists began this despicable enterprise with the express intent to kill their hostages if the PLO prisoners were not released from jail.

The events of March 11, 1978 constitute a tale of horror, indiscriminate violence and cold-blooded murder.

Upon landing on the beach in Israel, the Libyan-trained and -financed terrorists, without provocation, first shot to death an American photographer. Moving to the highway, they then attacked and commandeered an unarmed civilian bus carrying families of Egged Bus Company cooperative members returning from a company outing. The terrorists immediately killed some adults and children and took the remaining passengers hostage. Some of the terrorists then captured an unarmed civilian taxicab, fired at its passengers and took them hostage. Shooting at passing automobiles, they killed some passengers and wounded others in their limbs, chests and heads. Children were eyewitnesses to the shooting, torture and murder of their parents. Fathers sat helplessly as the terrorists physically and mentally abused their wives and children.

The terrorists then ordered the bus and taxicab drivers to travel toward Tel Aviv. Some of the terrorists sat on the roof of the cab and shot at passing cars, killing and maiming more unarmed civilians. One of the cars contained seven members of the Tel-Oren family, citizens of the United States; Hanoch Tel-Oren's fifteen year-old son was shot to death as his parents and siblings watched in horror.

Eventually, the terrorists shot at and stopped a second unarmed civilian bus, took its passengers hostage and forced them onto the first bus. On board the bus, the terrorists tied all the men to their seats, and beat, humiliated and tortured numerous hostages, including women and children. Captive parents were forced to watch their children abused and brutalized; youngsters saw their siblings murdered and disfigured. Meanwhile, some terrorists threw hand grenades supplied by Libya at passing cars.

Learning of these events, the civilian police set up a roadblock. The bus crashed through the roadblock, but was finally brought to a halt by the police. Unable to escape, the terrorists forced an adult male, Chaviv

Enekave, to leave the bus, apparently to deliver a negotiation message to the police officers. Just as Enekave left the bus, however, the terrorists shot him in the back of the head, killing him instantly. Two of Enekave's children, witnessing their father's cold-blooded murder, jumped up in anguish, and the terrorists immediately shot and killed them. Two of Enekave's other children, immobilized by terror and shock, witnessed all three of these summary executions.

Although the bus had been stopped, the terrorists continued to fire at the hostages within the bus and soon began to throw grenades at those hostages in the back of the bus. The shrapnel from the grenades sprayed in every direction, wounding numerous hostages. Using a little girl as a shield, the terrorists departed the bus, leaving behind heavy explosives purchased and supplied by Libya. They then threw additional hand grenades into the bus, igniting the explosives and setting the bus afire. Hostages tied to their seats were engulfed by the flames and burned to death. Others, immobilized by flying shrapnel, were also burned to death. Passengers who were able to extricate themselves watched as their family members died in the smoldering bus. The bus then exploded, killing more men, women and children.

By the time the incident was over, twenty-two adults and twelve children, including an American citizen, had been killed, and seventy-three adults and fourteen children were seriously wounded. The survivors sustained serious and permanent physical injuries, including the loss of limbs and ears, paralysis, burns to all parts of their bodies and incapacitating internal injuries, such as blood clots and hearing losses. All of the survivors suffer from permanent mental, emotional and psychological injuries, having witnessed the torture, abuse, humiliation and execution of family members and friends, and having themselves been subjected to this barbaric treatment.

On March 10, 1981, petitioners filed suit in the United States District Court for the District of Columbia.[1] Invoking jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity jurisdiction), 28 U.S.C. § 1350 (the Alien Tort Claims Act) and 28 U.S.C. §§ 1330, 1602-1611 (the Foreign Sovereign Immunities Act of 1976), petitioners sought compensatory and punitive damages. They alleged causes of action for tortious acts in violation of the law of nations, treaties of the United States and laws of the United States; for the intentional torts of assault, battery, false imprisonment, infliction of mental distress and infliction of cruel, inhuman and degrading treatment; and for conspiracy to commit torts in violation of the law of nations, treaties of the United States and laws of the United States.

Among petitioners' allegations was the claim that "the PLO and the thirteen terrorists were acting as agents of and were acting within the scope of their employment with Libya." Complaint at 19, ¶ 59. More specifically, petitioners asserted that Libya planned this terrorist operation; raised funds to support the operation; trained the thirteen terrorists for this specific attack; provided the PLO with the arms, boats, hand grenades and other equipment used in this terrorist operation; and gave a hero's welcome to the mother ship which had brought the terrorists to the shore of Israel. *Id.* Petitioners also alleged that Libya, subsequent to the terrorist operation, ratified and claimed responsibility for the attack. *Id.*

B. The District Court's Decision

On June 30, 1981, Judge Joyce Hens Green granted respondents' motion to dismiss petitioners' Complaint.

---

[1] Initially, two complaints were filed. The first named as plaintiffs the personal representatives of twenty-nine persons murdered in the attack; the second named sixty-five of the persons wounded in the attack. The complaints were consolidated on June 30, 1981, when the District Court ruled on respondents' motion to dismiss.

Judge Green held that section 1350 is merely jurisdictional and does not itself provide a cause of action. App. B at 125a-126a. She also held that section 1331 did not provide subject matter jurisdiction over the claims of the petitioners who are United States citizens. App. B at 117a-122a.[2]

C. The Court of Appeals' Decision

On appeal, a three-judge panel of the District of Columbia Circuit affirmed the dismissal of petitioners' Complaint, upholding the District Court's denial of jurisdiction over the claims of the aliens and the United States citizens. Two members agreed that the Circuit Courts of Appeals were now divided on the "broad and novel questions" presented by this case, and that review and clarification by this Court was necessary. App. A at 4a (Edwards, J., concurring); App. A at 104a (Bork, J., concurring). Indeed, Judge Edwards, recognizing the importance of the panel's decision, emphasized that "[t]his case deals with an area of the law that cries out for clarification by the Supreme Court." App. A at 4a (Edwards, J., concurring).

Although the panel issued a *per curiam* opinion, Judges Edwards, Bork and Robb filed separate concurring opinions totaling one hundred-fifteen (115) pages. While the court unanimously held that both the American and alien petitioners should not be afforded a right of redress, the panel members set forth startling and often dramatically different views on the questions of whether terrorism,

---

[2] Judge Green also stated that petitioners' claims were barred by the local one-year statute of limitations for certain torts. D.C. Code Ann. § 12-301(4). App. B at 127a-129a. The Court of Appeals did not reach this issue. App. A at 53a n.2 (Bork, J., concurring). In light of the unambiguous language of D.C. Code Ann. §§ 12-301(8) and 12-302, and controlling precedent in the District of Columbia Circuit, however, Judge Green clearly erred. *See, e.g., Richards v. Mileski*, 662 F.2d 65, 68 and n.5 (D.C. Cir. 1981); *Fitzgerald v. Seamans*, 553 F.2d 220, 223 and n.3 (D.C. Cir. 1977); *Canterbury v. Spence*, 464 F.2d 772, 793 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

torture, hostage-taking and summary execution constitute "law of nations" violations within the meaning of the Alien Tort Claims Act, the existence of a cause of action under the statute, the justiciability of this case and the availability of a cause of action under section 1331 for the American citizens murdered and injured in the attack. Judge Edwards held that section 1350 itself provides an express right to sue for violations of the law of nations. Ignoring petitioners' allegations that the PLO acted as an agent of and in conspiracy with Libya, however, he would affirm dismissal on the ground that the PLO is a non-state actor and, therefore, not subject to the dictates of international law. He also stated that the terrorists' actions did not violate the law of nations. Judge Bork agreed that these acts did not violate the law of nations, and further reasoned that the Complaint should be dismissed because it failed to identify an express right to sue separate and apart from section 1350. Judge Robb, abstaining from any discussion of section 1350 and the law of nations, opined that this case is made nonjusticiable by the political question doctrine.

1. *Terrorism, Torture, Hostage-Taking and Summary Execution as "Law of Nations" Violations*

Both Judges Edwards and Bork held that the acts of the Libyan-supported terrorists do not constitute violations of the "law of nations." In reaching their conclusions, Judges Edwards and Bork required unanimity of international opinion as a prerequisite to a finding that terrorism violates the law of nations. Judge Bork stated that there is "less than universal consensus" about "terrorism generally" and about "PLO-sponsored attacks on Israel . . . in particular." App. A at 71a (Bork, J., concurring). He argued that the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), relied upon below by petitioners as evidence of an inter-

national proscription of terrorism, "was said by at least one state at the time of its promulgation not to be applicable to Palestinian terrorist raids into Israel supported by Arab states. 24 U.N. GAOR 297, U.N. Doc. A/C.6/SR 1160 (1969) (remarks of Mr. El Attrash of Syria). . . ." *Id.* According to Judge Bork, this qualification on the Declaration, as well as the fact that "accusations of terrorism are often met not by denial of the fact of responsibility but by a justification for the challenged actions," *id.*, indicated a "lack of consensus" about terroism. *Id.* Judge Edwards also found that "[w]hile this nation unequivocally condemns all terrorist attacks . . . [such] sentiment is not universal." App. A at 46a (Edwards, J., concurring).

Judge Bork made one additional finding regarding the content of the law of nations. He apparently would confine that law to the three offenses that, he contended, were recognized by Blackstone and, therefore, contemplated by the drafters of section 1350 in 1789: piracy, violation of safe conducts and infringement of the rights of ambassadors. App. A at 84a-89a.

2. *The Availability of a Cause of Action Under Section 1350*

Relying on *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and the language of section 1350, Judge Edwards held that the statute itself provides an express right to sue for violations of the law of nations. App. A at 8a-14a (Edwards, J., concurring). Judge Bork, in contrast, rejected the interpretation of section 1350 adopted by Judge Edwards and the Second Circuit in *Filartiga*. He stated that "it is essential that there be an explicit grant of a cause of action" in either the law of nations or a treaty in order to establish jurisdiction under section 1350. App. A at 58a (Bork, J., concurring). Judge Bork then analyzed international law and found that it did not provide petitioners with a cause of action. App. A at 90a-96a.

While Judge Edwards concluded that section 1350, by its express terms, provides a cause of action, he would affirm dismissal on the ground that the PLO "is not a recognized state," App. A at 37a (Edwards, J., concurring), and, therefore, not subject to the dictates of international law. He sought to distinguish *Filartiga* on the ground that petitioners "do not allege facts to show that official or state-initiated torture is implicated in this action." App. A at 38a. The PLO, according to Judge Edwards, "does not act under color of any recognized state's law." App. A at 37a. In reaching this conclusion, however, Judge Edwards failed to consider petitioners' allegations that the PLO acted under color of Libyan authority and as an agent of that state. He also ignored petitioners' elaborate allegations of direct Libyan involvement in the attack.

3. *The Justiciability of this Case*

The political question doctrine, while never having been briefed or argued at the District Court or on appeal, was relied upon exclusively by Judge Robb to preclude adjudication of this case. He was concerned, in particular, that adjudication of this case will "embarrass[] . . . the nation," App. A at 111a-112a (Robb, J., concurring), and "dignify the violence of terrorist atrocities . . . ." App. A at 160a. Judge Bork, while admitting that "the contours of the doctrine are murky and unsettled," App. A at 63a n.8 (Bork, J., concurring), nevertheless adopted it and other considerations of justiciability as an underlying theme of his opinion. *See, e.g.*, App. A at 58a-72a, 103a. Both he and Judge Robb were concerned with the purported "inherent inability of federal courts," App. A at 105a (Robb, J., concurring), to hear cases such as that presented here.

Judge Edwards, in contrast, took strong objection to his colleagues' reliance on "facile labels of abstention or nonjusticiability, such as the 'political question doctrine,'" App. A at 48a (Edwards, J., concurring), and emphasized that "[n]onjusticiability based upon 'political

question' is *at best a limited* doctrine, and it is wholly inapposite to this case." App. A at 48a (emphasis in original). He warned that the doctrine "does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases." App. A at 52a.

4. *The Availability of a Cause of Action for the United States Citizens*

Judge Edwards expressly held that the Tel-Orens, citizens of the United States, had failed to establish jurisdiction under section 1331. He stated that the American citizens had not identified a remedy granted by the law of nations or by any treaties, and he declined to imply a right of action. App. A at 12a-13a n.4 (Edwards, J., concurring). Judge Bork, while not specifically setting forth his reasons, also found that there was no jurisdiction over the claims of the United States citizens. App. A at 54a (Bork, J., concurring).

D. The Filartiga Decision

The opinion of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), constitutes a fundamental part of the lower court's decision in this case. In *Filartiga*, a father and daughter, both Paraguayan citizens, alleged in a suit brought under section 1350 that a former Paraguayan official had tortured his son, her brother, in violation of the prohibition against torture in international law. The Second Circuit recognized that customary international law is an evolutionary concept, derived from the usage of nations, judicial opinions and the works of jurists. Reviewing the United Nations Charter, various declarations of the United Nations and numerous other international charters and accords, the Second Circuit held that international law had evolved in a manner that now clearly prohibited torture. *Id.* at 880-85. In reaching this conclusion, the Second Circuit looked to the "general assent of civilized nations," *id.* at 881, and did not

require unanimity of international opinion. Having found that torture violated the law of nations, the Second Circuit concluded that the elements of section 1350 had been satisfied; it imposed no requirement that plaintiffs establish a right to sue separate and apart from the statute itself. Nor did the court deem it necessary to discuss whether adjudication was precluded by the political question doctrine.[3]

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER ALIENS ARE TO BE DENIED REDRESS UNDER THE LAWS OF THE UNITED STATES FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION, AND TO RESOLVE THE CONFLICT BETWEEN THE DISTRICT OF COLUMBIA AND SECOND CIRCUITS ON THIS ISSUE

The decision below of the District of Columbia Circuit extinguishes the right of redress for persons who have been subjected to tortious actions in violation of the law of nations. This right of redress has been incorporated into, and recognized by, the law of the United States since 1789. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789). Having thus eliminated an important right of redress specifically guaranteed by Congress nearly two hundred years ago, the District of Columbia Circuit's decision, as two panel members expressly recognized, demands review by this Court.

The only provision in United States law granting such a right of redress to aliens is section 1350. The right of

---

[3] In *Filartiga*, the Second Circuit reversed the District Court's dismissal of plaintiffs' complaint. On remand, the District Court held that "an award of punitive damages of no less than $5,000,000 to each plaintiff is appropriate to reflect adherence to the world community's proscription of torture and to attempt to deter its practice." *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

redress granted by section 1350 has historically been available to victims of those acts properly classified as "*hostis humani generis.*" *Filartiga*, 630 F.2d at 890. Such acts have been considered so heinous and flagrant as to require their universal condemnation and adjudication. By 1789, when section 1350 was enacted, the common law had long declared the acts of piracy and slave-trading to be *hostis humani generis.* Terrorism, torture, hostage-taking and summary execution are modern equivalents of these acts. Like the acts of piracy and slave-trading, terrorism, torture, hostage-taking and summary execution are among the handful of acts that make the perpetrator "*hostis humani generis*, an enemy of all mankind." *Id.*[4]

The lower court eliminated the longstanding right of redress for such *hostis humani generis* acts in two distinct ways. First, Judge Bork held that the Alien Tort Claims Act fails to provide a cause of action but rather requires aliens to identify an explicit grant of a cause of action separate and apart from the statute itself. Since all such causes of action are provided by municipal law and not by the law of nations, this requirement negates any right of redress. Second, the court required unanimity of international opinion as a prerequisite to a finding that any act of a nation-state or its agent is in violation

---

[4] The limited number of acts encompassed by the doctrine of *hostis humani generis* is demonstrated by the relative paucity of suits in which plaintiffs have litigated successfully under section 1350. The acts at issue in the following cases were held to be not so heinous and flagrant as to entitle plaintiff to redress: *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (airline crashes do not violate the law of nations); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (court noted that "the Eighth Commandment 'Thou shalt not steal' is [not] part of the law of nations"); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (law of nations does not confer upon vessels of all nations an unrestricted right of access to harbors); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963) (unseaworthiness not a violation of international law).

of international law. This likewise eradicates a right of redress, since at least one state, the perpetrator, will condone the acts committed against the victims.

A further consequence of the decision is to exempt terrorism and the included acts of torture, hostage-taking and summary execution from classification as law of nations violations. The lower court's decision thus undermines the attempt by civilized nations to deter and prevent acts of terrorism, torture, hostage-taking and summary execution. Such an outcome is particularly troubling in light of the ever-increasing sponsorship of, and reliance upon, these acts throughout the world.

The lower court's decision, finally, conflicts with prior decisions of this Court and with *Filartiga*. The Second Circuit did not require plaintiffs to identify a right to sue separate and apart from section 1350 itself and, further contrasting with the decision below, it specifically found that torture violates the law of nations. This Court, moreover, as well as the Second Circuit, has required only that a "general assent among civilized nations" exist, and not unanimity of international opinion, in order to invoke international law.

A. Requiring Identification of a Right to Sue Separate and Apart from Section 1350 Nullifies the "Law of Nations" Portion of the Statute, Eliminates it as a Means of Redress and is Contrary to the Express and Unambiguous Language of the Statute

The construction of section 1350 proffered by Judge Bork, requiring identification of a separate right to sue, voids a significant portion of the statute. While he requires that an alien suing under section 1350 demonstrate an express right of action provided by the law of nations, Judge Bork himself concedes that "as a general rule, international law *does not provide* a private right of action. . . ." App. A at 91a (Bork, J., concurring) (emphasis added). Because the law of nations relegates to the states the decision whether to grant causes of action,

see, e.g., Henkin, *Foreign Affairs and the Constitution* 224 (1972), no plaintiff suing under section 1350 will ever be able to demonstrate a right to sue granted by international law.[5] Thus, as aptly summarized by Judge Edwards, "to require international accord on a right to sue . . . would be to effectively nullify the 'law of nations' portion of section 1350." App. A at 10a (Edwards, J., concurring).[6]

The language of section 1350 is unambiguous. Section 1350 grants jurisdiction over civil actions by an alien "for a tort only, committed in violation of the law of nations. . . ." It nowhere requires proof of a separate grant of a cause of action in order to establish a right of redress. Judge Bork's construction of the statute, as Judge Edwards pointed out, is "directly at odds with the language of the statute," App. A at 11a (Edwards, J., concurring), which "only mandates a 'violation of the law of nations' in order to create a cause of action." App. A at 12a. The "violation" itself thus creates a cause of action under section 1350.[7]

---

[5] Indeed, even the three offenses which Judge Bork contends were recognized by the drafters of section 1350—piracy, violation of safe conducts and infringement of the rights of ambassadors—would not be actionable under his theory since, as Blackstone himself made clear, "it was the municipal laws of England, not the law of nations, that made the cited crimes offenses. . . ." App. A at 11a (Edwards, J., concurring), citing 4 *Blackstone's Commentaries* 67 (Welsby ed. 1854).

[6] Judge Bork's construction of section 1350 thus raises substantial separation of powers concerns. As pointed out by Judge Edwards, to sustain such a construction "is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature." App. A at 35a (Edwards, J., concurring).

[7] That section 1350 itself provides a right to sue is further evidenced by a 1907 opinion of the United States Attorney General. The question posed in the opinion was whether any remedies were available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River. The Attorney General stated:

This construction of section 1350 is supported by the contrast between that statute and section 1331. Section 1331 requires that an action "arise under the Constitution, laws or treaties of the United States." This "arising under" language means that the source of plaintiff's right to sue is not section 1331 itself, but some other law, treaty or constitutional provision. Since section 1350 does not contain any similar "arising under" language, it does not require identification of a separate right to sue. This distinction is particularly significant since Congress revisited section 1350 in 1948. Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934. At that time, the term "arising under" had been a well-established element of federal jurisdiction for more than seventy years. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. As Judge Edwards pointed out, therefore, Congress was fully cognizant that it could draft section 1350 with "arising under" language or with other language requiring a separate "cause

---

> As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes *provide a right of action and a forum.* Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction 'of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States.' . . .
>
> *I repeat that the statutes thus provide a forum and a right of action.* I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.

26 Op. Att'y Gen. 250, 252-53 (1907) (emphasis added).

The Departments of Justice and State reaffirmed this interpretation of section 1350 in their *amicus curiae* brief filed in *Filartiga* upon invitation by the Second Circuit. The government not only stated that torture violates the law of nations, but also that it gives rise to a private cause of action under section 1350. Brief for the United States, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), App. C at 147a-150a.

of action" or "right to sue." App. A at 12a (Edwards, J., concurring). Congress, however, chose not to do so.

Judge Bork's interpretation of section 1350 is directly at odds with that of the Second Circuit in *Filartiga*. There, once the court determined that torture violated the law of nations, it found the jurisdictional elements of section 1350 to be satisfied. At no point in its analysis did the court require plaintiffs to identify a specific right to sue under the law of nations. Indeed, significant in *Filartiga* is the noticeable absence of any discussion of the question whether section 1350 granted a right of action.[8]

---

[8] The construction of section 1350 adopted by the Second Circuit is supported by the Sixth Circuit's decision in *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978). There, the grandmother of four children mistakenly evacuated in "Operation Babylift" from South Vietnam brought suit to have her grandchildren returned to her custody. The Sixth Circuit first rejected section 1331 as a basis for jurisdiction because it found that the treaties invoked by plaintiff did "not create a private right of action for aliens in the federal courts." *Id.* at 629. It then considered the applicability of section 1350. Rather than using Judge Bork's approach of searching for a private right of action under international law, as it had done under section 1331, the Sixth Circuit assumed that defendant's actions constituted a " 'tort only' within the meaning of the statute" and that "Congress has the constitutional authority under Article III to grant federal courts jurisdiction to create a federal common law of torts for aliens. . . ." *Id.* (footnote omitted). While the court ultimately held that section 1350 was not available because the conduct complained of did not violate the law of nations, its analysis of the statute—making no mention of the need to prove the existence of a private right of action outside the statute itself—plainly conflicts with that set forth by Judge Bork. *See also Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (court suggested that "the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations,' " while not making any reference to a requirement that plaintiffs identify a separate cause of action); *Valanga v. Metropolitan Life Insurance Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966) ("Once a tort can be considered to be in violation of the law of nations, § 1350 allows immediate access to a federal court").

Judge Edwards also contradicted the Second Circuit in holding that the actions of the PLO, which he classified as a non-state actor, are not subject to the dictates of international law and thus not within the purview of section 1350. The PLO in this case stands in the same relation to Libya as the defendant in *Filartiga* did to Paraguay. Here, as in *Filartiga*, the perpetrator is alleged to have acted as an agent of a sovereign state. Indeed, the state nexus is even stronger here than in *Filartiga*, since the terrorists were acting in accordance with Libyan authority, rather than, as Judge Bork describes the Paraguayan official in *Filartiga*, "in violation of the constitution and law of . . . [the] state" and in a manner " 'wholly unratified by that nation's government.' " App. A at 97a (Bork, J., concurring), quoting *Filartiga*, 630 F.2d at 889. Judge Edwards' holding also ignores petitioners' clear and elaborate allegations that Libya sponsored the terrorist attack and that the PLO acted as Libya's agent and under color of its authority. *See* Complaint at 19, ¶ 59. Given these allegations, Judge Edwards' own rationale compels a finding that the District Court *did* have jurisdiction over the PLO. As Judge Bork explained:

> It can be argued that appellants have alleged 'official' torture: the complaint alleges that the PLO, in carrying out its attack . . . was acting at the behest of and in conjunction with Libya. Viewed this way, this case is indistinguishable from *Filartiga*, and as such, Judge Edwards' approach would force us to hear it.

App. A at 101a (Bork, J., concurring).[9]

---

[9] Judge Edwards' assumption that Libya enjoys immunity from this suit, App. A at 4a-5a n.1 (Edwards, J., concurring), can neither explain nor rectify his apparent oversight. First, Libya, the only party with standing to raise the Foreign Sovereign Immunities Act as a defense, has never filed an answer to the Complaint; the issue, therefore, has never been briefed or argued bfore the District Court or the Court of Appeals. Furthermore, Libya cannot invoke immunity in this case because its acts are prohibited by

B. Limiting the Prohibitions of the Law of Nations to Acts Unanimously Condemned by all Nation-States Denies Redress to Victims of Acts Prohibited by the Community of Nations, Renders the Law of Nations Meaningless as a Mechanism for Governing the Conduct of Nation-States and Eradicates Customary International Law from United States Law

Judges Bork and Edwards agreed that the barbaric acts of terrorism, torture, hostage-taking and summary execution committed by Libya and its PLO agents do not violate the law of nations. They reached this startling conclusion because they found that at least one nation-state failed to condemn these kinds of acts. In their view, the law of nations prohibits only those acts which are condemned unanimously by all nation-states.

Demanding unanimity of international opinion before acts are deemed to be in violation of the law of nations, however, means that no state-sponsored violation of international law could ever be found. There will always be at least one nation, the sponsor, whose approval of these kinds of acts prevents a finding that they violate international law.[10] This leaves the victim of acts con-

---

the doctrine of *hostis humani generis*. With regard to its actions in this case, it is an "enemy of all mankind" whose actions are subject to universal condemnation and adjudication and as such are not protected by the cloak of immunity. Even if the Foreign Sovereign Immunities Act did bar suit against Libya, this case must proceed against the PLO, which is alleged to have acted as that state's agent. Indeed, just as a plaintiff sues an individual to redress official wrongdoing when barred from suing an American state by the Eleventh Amendment, *see Ex Parte Young*, 209 U.S. 123 (1908), so may petitioners sue the PLO herein. In either case, all that is required is that the defendant acted "under color of" state authority.

[10] Perhaps the best illustration of the defects characterizing this analysis was provided by Judge Bork himself. He referred to remarks by a Syrian representative as evidence of the lack of consensus concerning "PLO-sponsored attacks on Israel." App. A at 71a (Bork, J., concurring). Syria itself, of course, is known to approve of and sponsor attacks against Israel. In effect, Judge

demned by the world community without any right of redress. Such an outcome is indefensible, for surely the opposition of one or a few states should not be allowed to repudiate the basic tenets of law that would otherwise protect the victims of such acts. *See* Blum and Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 Harv. Int'l L.J. 52, 81 (1981).

Taken to its logical conclusion, the court's requirement of unanimity of international opinion renders international law without force and effect and thus useless as a mechanism for governing the conduct of, and establishing the standards for relationships between, nations. Furthermore, under this theory, customary international law will no longer be incorporated into American jurisprudence as a basis for decision-making since no violation of that law can ever be demonstrated in disputes involving a defendant state or its agents. This proposition is contrary to the express holding of this Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

Construing the law of nations to require unanimity also runs afoul of well-settled principles concerning the content of international law. As stated by this Court in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the *general* usage and practice of nations; or by judicial decisions recognizing and enforcing that law." (emphasis added). *See also Filartiga*, 630 F.2d at 880. Far from demanding unanimity, international law

---

Bork stated that since Syria chooses to support terrorist raids, the torture, hostage-taking and summary execution those raids raids comprise cannot violate international law.

looks only to the "general assent of civilized nations." *The Paquete Habana*, 175 U.S. at 694; *Filartiga*, 630 F.2d at 881.

Civilized nations clearly agree that terrorism, torture, hostage-taking and summary execution are prohibited by international law. For example, with respect to terrorism, the Assembly of the League of Nations, in its Convention for the Prevention and Punishment of Terrorism, "reaffirm[ed] the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape. . . ." 7 Hudson, International Legislation, 862 L. of N. Off. J., Jan. 1938, 23, App. D at 152a. The Organization of American States, in its Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1117 (1970), App. D at 155a, emphasized that terrorist acts constitute "flagrant violation[s] of the most elemental principles of the security of the individual and community as well as offenses against the freedom and dignity of the individual. . . ." Importantly, the Statement of Reasons for this Draft Convention states:

> Terrorist acts *always* have been the target of public condemnation because of their utter inhumanity and irrationality. . . . [T]errorism is a crime of international law, *unanimously condemned*, even though it may pursue a political or social aim.

O.A.S. Document CP/doc. 54/70 rev. 1 (1970), *reprinted in* 9 Int'l Legal Materials 1250, 1259 (1970) (emphasis added), App. D at 158a.[11]

---

[11] *See also* Council of Europe Committee of Ministers Resolution 74(3) on Int'l Terrorism, 1974 Eur. Y.B. 387 (Council of Europe), *reprinted in* 13 Int'l Legal Materials 471 (1974), App. D at 160a (member nations urged to prosecute terrorists when their acts "create a collective danger to human life, liberty or safety; when they affect innocent persons foreign to the motives behind them;

These international accords and agreements plainly indicate that terrorism constitutes a violation of international law. As stated by one commentator:

> [A]lthough there is a lack of consensus on the definition of terrorism, there is a uniformity of purpose in seeking to prevent and punish acts of terrorism. This is an implicit recognition that terrorism is a violation of law, because there must be illegality for punishment to be imposed. In addition, the general statements of human rights conventions demonstrate international consensus that torture and cruel and inhuman treatment, components of terrorist acts, are violations of international law. Thus, sufficient international consensus has been demonstrated for terrorism to be deemed a violation of the law of nations.

Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. 236, 247 (1982) (footnote omitted).

The acts of terrorism at issue in this case include independent acts of torture, hostage-taking and summary execution. Certainly, these acts, inflicted upon civilians, violate the law of nations. The authorities cited by the Second Circuit in *Filartiga*, for example, plainly demonstrate that torture violates the law of nations. 630 F.2d at 881-84.[12] The International Convention Against the

---

when cruel or vicious means are used in the commission of those acts"); European Convention on the Suppression of Terrorism, Eur. T.S. No. 90, 15 Int'l Legal Materials 1972 (1976), U.K.T.S. No. 93 (1978), App. D at 161a (urging punishment of those engaged in "an offense involving kidnapping, the taking of a hostage or serious unlawful detention"); Restatement of the Law of Foreign Relations (Revised) § 702 (Tent. Draft No. 3, 1982) (enumerates as violations of international law state-practiced, -encouraged or -condoned "murder" and "torture or other cruel, inhuman or degrading treatment or punishment").

[12] In their *amicus* brief in *Filartiga*, the Departments of Justice and State reviewed an extensive number of international treaties and accords, all of which confirmed the international proscription of torture. *See* Brief for the United States, App. C at 141a-146a.

Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) 245, *reprinted in* 18 Int'l Legal Materials 1457 (1979), App. D at 163a, moreover, states that "the taking of hostages is an offense of grave concern to the international community," and that it is necessary to engage in the "prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism." *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, App. D at 166a (summary executions defined as "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples").

The refusal of the District of Columbia Circuit to recognize that terrorism, torture, hostage-taking and summary execution violate the law of nations conflicts with *Filartiga*. There, the Second Circuit specifically ruled that torture is prohibited by the law of nations within the meaning of section 1350. This prohibition, according to the court, is "clear and unambiguous." 630 F.2d at 884. The Second Circuit emphasized that numerous international agreements condemn the use of torture and that torture is renunciated throughout the world.

In reaching its decision in *Filartiga*, the Second Circuit stated that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881. In stark contrast, Judge Bork apparently held that the law of nations should be confined to the three principal offenses recognized by Blackstone three centuries ago: piracy, violation of safe conducts and infringement of the rights of ambassadors. The Second Circuit relied in *Filartiga* on this Court's holding that the law of nations is not stagnant, but evolves over time:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of *what the law really is.*

The Paquete Habana, 175 U.S. at 700 (emphasis added).

II. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER REDRESS FOR STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION IS TO BE DENIED BECAUSE OF THE POLITICAL QUESTION DOCTRINE

Judge Robb relied exclusively on the "political question" doctrine to preclude adjudication of petitioners' claims of terrorism, torture, hostage-taking and summary execution. Judge Bork also advanced the political question doctrine, as well as other related considerations of justiciability, as an underlying theme of his opinion. Their opinions conflict with prior decisions of this Court and with the analysis of the Second Circuit in *Filartiga*. Review by this Court is necessary to resolve this conflict and to determine whether a suit seeking damages under sections 1331 and 1350 for acts of terrorism, torture, hostage-taking and summary execution is necessarily nonjusticiable because of the political question doctrine.

The invocation and use of the political question doctrine by Judges Robb and Bork is contrary to this Court's modern formulation of that doctrine in *Barker v. Carr*, 369 U.S. 186 (1962), where Justice Brennan wrote:

> Prominent on the surface of any case held to involve a political question is found a textually demon-

> strable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Justice Brennan subsequently emphasized the narrowness of the political question doctrine with respect to foreign policy matters in *Goldwater v. Carter*, 444 U.S. 996 (1979), stating: "Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'" *Id.* at 1006 (Brennan, J., dissenting), quoting *Baker*, 369 U.S. at 211-13.

The issues raised by petitioners' allegations of terrorism, torture, hostage-taking and summary execution are not among those made nonjusticiable by the political question doctrine. Whether there exists a "general assent among civilized nations" that such acts are prohibited, for example, is not a question that has been constitutionally committed to a coordinate branch of government; rather, it is a question that, calling for an analysis of the content and applicability of the law of nations, is undeniably within the proper scope of judicial review. Furthermore, whether section 1350 provides its own right to sue is a question of statutory construc-

tion, clearly susceptible of judicial handling. The enactment of section 1350, in fact, plainly evidences a congressional intent to channel into the federal courts lawsuits such as this that implicate actual or potential violations of the law of nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Ex Parte Quirin*, 317 U.S. 1, 27-30 and n.6 (1942). Finally, whether petitioners are entitled to the relief requested depends upon factual determinations that the alleged wrongful death and severe injuries occurred, and that the acts of Libya and its sponsored and financed terrorists caused those events. Certainly, the federal courts are capable of making such determinations.

The other concerns identified in *Baker* are equally inapplicable to the case at bar. The Court does not, for example, lack "judicially discoverable and manageable standards." *Baker*, 369 U.S. at 217. In *The Paquete Habana*, 175 U.S. at 700, this Court discussed the means of discovering the content of and applying the law of nations, and the principles set forth there should be applied with equal force herein. Moreover, as Judge Robb himself recognized, "[t]here has been no executive recognition" of the PLO, App. A at 107a (Robb, J., concurring), nor any specific governmental action or decision taken regarding the terrorist acts at issue herein. Accordingly, there have been no "political decision[s] already made" to which there exists "an unusual need for unquestioning adherence." *Baker*, 369 U.S. at 217.

Judge Robb's exclusive reliance upon both the political question doctrine and the theory that federal courts should not entertain cases such as this, involving allegations of terrorism, torture, hostage-taking and summary execution, conflicts not only with *Baker v. Carr* but also with *Filartiga*. That case, like this one, involved allegations of torture; there, as here, foreign policy considerations were implicated; that suit, like the one brought by petitioners, challenged the actions of a sovereign's agent. Nevertheless, the Second Circuit, unlike Judges Robb and

Bork, did not hold or even suggest that adjudication was precluded on the basis of the political question doctrine or the political nature of the case. Indeed, in *Filartiga*, the Second Circuit specifically requested the Departments of State and Justice to provide an opinion of the "proper interpretation of 28 U.S.C. § 1350 in light of the facts of this case," Brief for the United States, App. C. at 132a, thereby affording the government the opportunity to comment on the applicability of the political question doctrine or other general considerations of justiciability. In contrast, Judges Robb and Bork, without any statement from the State Department or any other evidence to support preclusion, seemingly presumed that the Department of State had acted in this case in such a manner that prevents its adjudication. Judge Robb, in particular, then made this assumption dispositive of the issues presented. The error associated with such action is no better illustrated than by an examination of the government's Brief in *Filartiga*, where, concluding that plaintiffs' claims were properly before the court, it stated: "Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government." Brief for the United States, App. C at 148a.

The use of the political question doctrine by Judges Robb and Bork is premised upon an inaccurate characterization of petitioners' claims. Petitioners in this case do not, as Judges Robb and Bork have apparently presumed, seek adjudication of the status of the PLO, the relationship between Israel and the PLO or the relationship generally between the United States and the Middle East. Rather, a far narrower issue is presented: whether petitioners are entitled to a damage award under section 1331 and 1350 as a result of the terrorism, torture, hostage-taking and summary execution allegedly inflicted by Libya and its terrorist agents.

Of course, because this case involves acts that were perpetrated in the Middle East and because the United

States' activities in that region are the subject of national interest, the issues are presented in a more politically-charged context. As this Court emphasized in *Baker*, however, "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217. Indeed, the presence of issues "with significant political overtones does not automatically invoke the political question doctrine." *INS v. Chadha*, —— U.S. ——, 103 S. Ct. 2764, 2780 (1983). The Court's duty in this case, as Chief Justice Marshall declared in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), is undeniable: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

III. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER PETITIONERS WHO ARE UNITED STATES CITIZENS ARE TO BE DENIED REDRESS UNDER 28 U.S.C. § 1331 FOR INJURIES SUFFERED AS A RESULT OF STATE-SPONSORED ACTS OF TERRORISM, TORTURE, HOSTAGE-TAKING AND SUMMARY EXECUTION

The Tel-Oren petitioners, citizens of the United States, were held below to have failed to establish jurisdiction under section 1331 because the treaties of the United States do not give rise to a cause of action for the injuries they sustained. This holding conflicts with prior decisions of this Court and the Ninth Circuit. Review is thus necessary to resolve this conflict and to determine whether the petitioners who are United States citizens have causes of action "arising under . . . treaties of the United States" within the meaning of section 1331.

The ratification of a treaty by the United States makes it the law of the United States. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). In *Head Money Cases*, 112 U.S. 580, 598-99 (1884), this Court structured the test for determining when ratified treaties confer private rights on United States citizens:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

The lower court's holding that the Tel-Orens did not establish jurisdiction under section 1331 conflicts with this ruling, since under the standard set forth in *Head Money Cases* the Tel-Orens clearly have causes of action arising under treaties of the United States. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, App. D at 165a-166a, for example, satisfies the standard set forth in *Head Money Cases*.[13] Its essential purpose is directed to protecting the rights of persons who are civilians. It confers individual rights on such persons, and states in detail that these individuals are to be free from acts of torture, terror, hostage-taking and genocide. The rights given to individuals are clear, unmistakable and enforceable in United States courts, without the enactment of any new legislation, pursuant to the "arising under" clause of section 1331.[14]

---

[13] Other treaties satisfying this standard are Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993; Convention with Respect to the Law and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; and Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135.

The failure to recognize that the American citizens have causes of action arising under treaties of the United States also conflicts with the decision of the Ninth Circuit in *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). There, plaintiffs alleged that they had a private right of action based on a Trusteeship Agreement pursuant to which the United States was authorized to administer the territory of Micronesia. The Ninth Circuit held that plaintiffs did indeed have a private right of action, stating:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self execution.

Id. at 97. For the reasons stated above, the Geneva Convention and the other cited treaties confer on petitioners a private cause of action pursuant to this test established by the Ninth Circuit.

CONCLUSION

This case presents the profoundly important question of whether the federal judiciary will construe sections 1331 and 1350 to provide redress for barbaric acts condemned by the civilized world. The decision below eradicates a right of redress granted to the victims of such acts, a right of redress incorporated into our law by the First Judiciary Act two hundred years ago. This case

---

[14] Judge Bork errs when he suggests that *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978), held that the first Geneva Convention is not self-executing. That decision addressed only portions of the Convention not at issue here.

also presents the compelling question of whether international law will retain its traditional role as an important part of American jurisprudence.

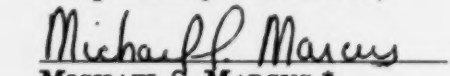
Two of the judges below have recognized the significance of these questions and the need for review by this Court. As explained by Judge Bork, "[t]he meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed." App. A at 104a (Bork, J., concurring). Judge Edwards is even more explicit:

> This case deals with an area of the law that *cries out for clarification by the Supreme Court.* We confront at every turn broad and novel questions about the definition and application of the 'law of nations.' . . . [T]he central controversy of this action has now produced divided opinions between and within the circuits.

App. A at 4a (Edwards, J., concurring) (emphasis added).

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

Respectfully submitted,



MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN
& MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

June 15, 1984

Office - Supreme Court, U.S.
FILED
JUN 14 1984
ALEXANDER L. STEVAS
CLERK

83 - 2052

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN & MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

APPENDIX A— Page

Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit 1a

APPENDIX B—

Memorandum Opinion and Order of the United States District Court for the District of Columbia.. 115a

APPENDIX C—

Amicus Curiae Brief for the United States in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 131a

APPENDIX D—

1937 League of Nations Convention for the Prevention and Punishment of Terrorism, Articles 1-5 ..... 152a

1970 Inter-American Juridical Committee (O.A.S.): Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion.. 155a

1970 O.A.S. Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Articles I, VIII.... 158a

1974 Council of Europe Committee of Ministers Resolution 74 (3) on International Terrorism 159a

1976 European Convention on the Suppression of Terrorism, Preamble, Article 1 ..... 161a

1979 International Convention Against the Taking of Hostages, Preamble, Articles 1, 2 ..... 163a

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Articles 1-3.... 165a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1870

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, et al.,
Appellants

v.

LIBYAN ARAB REPUBLIC, et al.

No. 81-1871

HANOCH TEL-OREN, et al.,
Appellants

v.

LIBYAN ARAB REPUBLIC, et al.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action Nos. 81-0563 & 81-0564)

Argued March 24, 1982

Decided February 3, 1984

Michael S. Marcus, with whom *Oren R. Lewis, Jr.*, and *Richard H. Jones* were on the brief, for appellants.

Karla J. Letsche for appellee, National Association of Arab Americans. *Cherif Sedky* and *Lawrence Coe Lanpher* were on the brief, for appellee, National Association of Arab Americans.

Michael Kennedy was on the brief, for appellee, Palestine Information Office.

Michael E. Tigar entered an appearance for appellee, Palestine Congress of North America.

Before: EDWARDS and BORK, *Circuit Judges*, and ROBB, *Senior Circuit Judge*.

Concurring opinions filed by *Circuit Judge* EDWARDS, *Circuit Judge* BORK, and *Senior Circuit Judge* ROBB.

PER CURIAM: Plaintiffs in this action, mostly Israeli citizens, are survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel in March 1978. They filed suit for compensatory and punitive damages in the District Court, naming as defendants the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.[1]

In their complaint, plaintiffs alleged that defendants were responsible for multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law. Jurisdiction was claimed under four separate statutes: 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1350 (providing jurisdiction over actions by an alien alleging a tort committed in violation of the law

[1] Plaintiffs do not pursue their claim against the Palestine Congress of North America on appeal.

of nations or a treaty of the United States); and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611. For purposes of our jurisdictional analysis, we assume plaintiffs' allegations to be true.

The District Court dismissed the action both for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981). Plaintiffs appeal the District Court's rulings on two of their claimed jurisdictional bases, 28 U.S.C. §§ 1331, 1350, and on the statute of limitations issue.

We affirm the dismissal of this action. Set out below are separate concurring statements of Judge Edwards, Judge Bork, and Senior Judge Robb, indicating different reasons for affirming the result reached by the District Court.

EDWARDS, *Circuit Judge, concurring*: This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations." As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

At issue in this case is an aged but little-noticed provision of the First Judiciary Act of 1789, which gives federal courts jurisdiction over a minute class of cases implicating the law of nations. Thus, it is not startling that the central controversy of this action has now produced divided opinions between and within the circuits. The opinions of Judge Bork and Judge Robb are fundamentally at odds with the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which, to my mind, is more faithful to the pertinent statutory language and to existing precedent. Although I cannot concur in the opinions of my colleagues, I do agree with them that the decision of the District Court should be affirmed. I write separately to underscore the rationale for my decision; I do this because, as will be apparent, there are sharp differences of viewpoint among the judges who have grappled with these cases over the meaning and application of 28 U.S.C. § 1350 (1976).[1]

---

[1] That I confine my remarks to issues directly related to the construction of § 1350 should in no respect be read as an endorsement of other aspects of my colleagues' opinions. Indeed, I disagree with much of the peripheral discussion they contain.

My analysis also is limited to the allegations against the Palestine Liberation Organization. I agree with the District Court that the complainants' allegations against the Palestine Information Office and the National Association of Arab Americans are too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated. *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981). Jurisdiction over Libya is barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976), which preserves immunity for

I. Background

On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization (hereinafter "the PLO") turned a day trip into a nightmare for 121 civilian men, women and children. The PLO terrorists landed by boat in Israel and set out on a barbaric rampage along the main highway between Haifa and Tel Aviv. They seized a civilian bus, a taxi, a passing car, and later a second civilian bus. They took the passengers hostage. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded. Most of the victims were Israeli citizens; a few were American and Dutch citizens. They turned to our courts for legal redress and brought this action for damages asserting jurisdiction under 28 U.S.C. §§ 1331 and 1350 (1976). The District Court dismissed the action for lack of subject matter jurisdiction. The critical issue on appeal is whether plaintiffs alleged sufficient facts to meet the jurisdictional elements of those sections.

II. The Filartiga Decision

My inquiry into the sufficiency of plaintiffs' allegations is guided by the Second Circuit's decision in *Filartiga*. For reasons set out below, I adhere to the legal principles established in *Filartiga* but find that factual distinctions preclude reliance on that case to find subject matter jurisdiction in the matter now before us. Specifically, I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law. Absent direction from the Supreme Court on the proper scope of the obscure section 1350, I am there-

---

tort claims unless injury or death occurs in the United States. 28 U.S.C. §§ 1604, 1605(a)(5) (1976).

fore not prepared to extend *Filartiga's* construction of section 1350 to encompass this case.

The pertinent allegations in *Filartiga* are as follows. Dr. Joel Filartiga, a Paraguayan known to oppose the Paraguayan Stroessner regime, and his daughter, Dolly, alleged that, in 1976, the defendant Pena-Irala, a Paraguayan police official, had kidnapped and tortured to death Dr. Filartiga's 17-year-old son, Joelito. They claimed he was killed in retaliation for his father's political activities. On the day of the murder, Dolly Filartiga was taken to Pena's home and confronted with her brother's body, which bore marks of severe torture. Thereafter, Filartiga commenced a murder action against Pena in a Paraguayan court. The action was still pending at the time of the Second Circuit opinion.

Pena entered the United States in 1978 on a visitor's visa and remained beyond the term of the visa, living in Brooklyn, New York. Dolly Filartiga, living in Washington, D.C., learned of his presence and notified the Immigration and Naturalization Service. She also filed a civil complaint against him, alleging that he had wrongfully caused her brother's death by torture and seeking compensatory and punitive damages of ten million dollars. Jurisdiction was claimed under the general federal question provision, 28 U.S.C. § 1331 (1976), and under the Alien Tort Statute, 28 U.S.C. § 1350 (1976). The District Court dismissed the complaint on jurisdictional grounds. In so doing, the trial court relied on prior cases in which the Second Circuit had defined the "law of nations" to encompass only relationships between states, or an individual and a foreign state, and not a state's treatment of its own citizens. *E.g., Dreyfus v. von Finck*, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT* [sic] *v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). It concluded that a Paraguayan plaintiff's suit against a Paraguayan defendant did not implicate the law of nations and, therefore, did not fit within

the jurisdictional limits of section 1350. The Second Circuit reversed the district court and remanded for further proceedings.

Section 1350 provides that a district court shall have original jurisdiction over civil actions "*by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*" In the absence of an allegation of a treaty violation, the critical issue in *Filartiga* was whether torture constitutes a violation of the law of nations. In determining that it does, Judge Kaufman reviewed the accepted sources of international law—the usage of nations, judicial opinions and the works of jurists—and concluded that *official torture* of both aliens and citizens is prohibited by the law of nations. 630 F.2d at 884. That section 1350 was enacted in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77, when world perceptions both of the role of international law and its substantive provisions differed considerably from perceptions of today, did not preclude this result. Judge Kaufman took guidance from *The Paquete Habana*, 175 U.S. 677 (1900) (holding that the traditional prohibition against seizure of an enemy's coastal fishing vessels had ripened from a standard of comity into a settled rule of international law), and observed that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881.

The opinion thus established several propositions. First, the "law of nations" is not stagnant and should be construed as it exists today among the nations of the world. *Id.* Second, one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators. *Id.* at 884. Third, international law today places limits on a state's power to torture persons held in custody, and confers "fundamental rights upon all people" to be free from torture. *Id.* at 885. Fourth, section 1350 opens the federal courts for adjudication of the

rights already recognized by international law. *Id.* at 887.

Because I am substantially in accord with these four propositions, and Judge Bork and Judge Robb apparently are not, I am unable to join in their opinions.

III. Section 1350 as the Source of the "Right to Sue"

First, and most fundamentally, I diverge from the views of my colleague Judge Bork regarding the necessary elements of this court's jurisdiction. The Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations. In contrast, Judge Bork would deny jurisdiction to any plaintiff—presumably including those in *Filartiga*—who could not allege a specific right to sue apart from the language of section 1350 itself. In Part A, below, I outline the Second Circuit's formulation of section 1350 and summarize my reasons for endorsing it. In Part B, I offer an alternative formulation of section 1350 under which domestic tort law, not the law of nations, provides plaintiffs with the substantive right needed to trigger application of section 1350. I am less comfortable with the alternative formulation; however, in the face of the obscure history of section 1350, I would be remiss were I to ignore a tenable construction of this difficult statutory provision.

A. *Section 1350 Provides a Right of Action and a Forum: The* Filartiga *Formulation*

Judge Bork's suggestion that section 1350 requires plaintiffs to allege a right to sue granted by the law of nations is seriously flawed. Initially, it assumes that the "law of nations" could provide a specific, articulated right

to sue in a form other than a treaty or executive agreement. Yet no evidence is offered to indicate that jurists or commentators have ever looked to the law of nations to determine when a wrongful deed is *actionable.* This absence of evidence is not surprising, because it is clear that "[i]nternational law itself, finally, does not require any particular reaction to violations of law . . . . Whether and how the United States wished to react to such violations are domestic questions . . . ." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972) (footnote omitted).

The law of nations thus permits countries to meet their international duties as they will, *see* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); *cf.* 1 C. HYDE, INTERNATIONAL LAW 729 n.5 (2d rev. ed. 1945). In some cases, states have undertaken to carry out their obligations in agreed-upon ways, as in a United Nations Genocide Convention, which commits states to make genocide a crime, L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra,* or in bilateral or multilateral treaties. Otherwise, states may make available their municipal laws in the manner they consider appropriate. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3 comment h & illustration 5 (1965) (domestic law of a state may provide a remedy to a person injured by a violation of a rule of international law). As a result, the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard even to imagine that harmony ever would characterize this issue.

In consequence, to require international accord on a right to sue, when in fact the law of nations relegates decisions on such questions to the states themselves, would be to effectively nullify the "law of nations" portion of section 1350. There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it "inoperative or superfluous, void or insignificant," 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973), and there exists a presumption against a construction yielding that result. *See Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988, 994 (D.C. Cir. 1975). Yet, the construction offered by Judge Bork would have the effect of voiding a significant segment of section 1350.[2]

---

[2] In obvious contrast is a treaty, which may create judicially enforceable obligations when that is the will of the parties to it. *See People of Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (elaborating criteria to be used to determine whether international agreement establishes affirmative and judicially enforceable obligations without implementing legislation), *cert. denied*, 420 U.S. 1003 (1975). Unlike the law of nations, which enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms, treaties establish both obligations and the extent to which they shall be enforceable.

We therefore must interpret section 1350 in keeping with the fact, well-known to the framers of section 1350, that a treaty and the law of nations are entirely different animals. As Judge Bork states, for two hundred years it has been established that treaties by their terms and context may create enforceable obligations. Similarly, for two hundred years, it has been established that the law of nations leaves up to municipal law whether to provide a right of action to enforce obligations created by the law of nations. Section 1350 opened federal courts to aliens to challenge violations of treaties insofar as treaty terms expressly or impliedly established affirmative and judicially enforceable obligations. Congress also opened courts to aliens to challenge violations of the law of nations, to the extent that the law of nations established a binding obligation. Section 1350 thus provides a forum for actions brought to enforce obligations binding on parties, whether as a result of

Judge Bork argues that the statute retains meaning under his interpretation because he recognizes that the drafters of Section 1350 perceived of certain offenses against the law of nations. He enumerates three offenses recognized by Blackstone—violation of safe-conducts, infringement of the rights of ambassadors, and piracy—and insists that these were the offenses that the drafters of section 1350 had in mind. This explanation is specious, not responsive. Judge Bork does nothing more than concede that, in 1789, the law of nations clause covered three substantive offenses. However, under his construction of section 1350, this concession is meaningless unless it is also shown that the law of nations created a private right of action to avenge the three law of nations violations to which Blackstone averted—a showing that would require considerable skill since the law of nations simply does not create rights to sue. Indeed, in the very passage quoted by Judge Bork, Blackstone makes clear that it was the municipal laws of England, not the law of nations, that made the cited crimes offenses: "The principal offenses against the law of nations, *animadverted on as such by the municipal laws of England*, are of three kinds: 1. Violation of safeconducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 BLACKSTONE'S COMMENTARIES 67 (Welsby ed. 1854) (emphasis added). In short, under Judge Bork's construction of the statute, section 1350 would lose virtually all meaning.

Equally basic, to require an express right to sue is directly at odds with the language of the statute, which grants jurisdiction over civil actions for a tort "committed in violation of the law of nations." Unlike section 1331, which requires that an action "arise under" the laws of the United States, section 1350 does not re-

---

treaties or the law of nations. To argue that § 1350, under any formulation, could create a right to sue or somehow make all treaties self-executing, when parties to the treaties intend otherwise, is to thoroughly misconstrue the nature of treaty law.

quire that the action "arise under" the law of nations, but only mandates a "violation of the law of nations" in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350. Judge Bork nevertheless would propose to write into section 1350 an additional restriction that is not even suggested by the statutory language. Congress, of course, knew full well that it could draft section 1350 with "arising under" language, or the equivalent, to require a "cause of action" or "right to sue," but it chose not to do so.[3] There simply is no basis in the language of the statute, its legislative history or relevant precedent to read section 1350 as though Congress had required that a right to sue must be found in the law of nations.[4]

---

[3] It might be argued that in 1789 Congress had not enacted general federal question jurisdiction, with its "arising under" provision, and could not have used that phraseology as a reference point. Not until 1875 did Congress give federal courts general original jurisdiction over federal question cases. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. However, in its original form, the predecessor to § 1350 did not contain the word "committed." The pertinent part of the clause granted jurisdiction "where an alien sues for a tort only in violation of the law of nations." The word "committed" appears in a 1948 recodification of the Judicial Code, Act of June 25, 1948, ch. 646, § 1350, 62 Stat. 869, 934, but was absent in earlier recodifications. *See, e.g.*, Act of Mar. 3, 1911, ch. 231, § 24, par. 17, 36 Stat. 1087, 1093. By 1948 the term "arising under" was a well-established element of federal question jurisdiction, *see American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (a suit "arises under" the law that creates the action), and would have been the obvious choice of wording had Congress wished to make explicit that, in order to invoke § 1350, a right to sue must be found in the law of nations.

[4] I disagree both with Judge Bork and with plaintiffs in this action that for purposes of the issues raised in this case, the jurisdictional requirements of § 1331 and § 1350 are the same.

[Continued]

Indeed, a 1907 opinion of the United States Attorney General suggests just the opposite. It asserts that section 1350 provides both a right to sue and a forum. Respond-

---

[4] [Continued]

However, for several reasons I believe plaintiffs' claim under § 1331 fails as well. My analysis on that issue proceeds on two paths, depending on whether the plaintiff is a citizen or an alien.

As to aliens, most of the plaintiffs here, jurisdiction under § 1331 is available at least to the extent that § 1350 applies. If it does, their action "arises under" § 1350 and, therefore, under a law of the United States, as required by § 1331.

Citizens of the United States, in this action the Tel-Oren plaintiffs, do not meet the alienage requirement of § 1350 and must seek other law under which their action might arise. The only plausible candidate is the law of nations itself.

Assuming, without deciding, that the law of nations constitutes a law of the United States for § 1331 jurisdictional purposes, *see Moore, Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 291-97 (arguing that § 1331 includes cases arising under a federal decisional law of foreign relations); *cf.* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 222-23 (1972) (federal courts determine international law and apply it as though it were federal law), the language of § 1331, unlike § 1350, suggests that plaintiffs must identify a remedy granted by the law of nations or argue successfully for one to be implied. Plaintiffs here are not able to point to a right to sue in international law and I decline to imply one, given my belief, set out *supra*, that the law of nations consciously leaves the provision of rights of action up to the states.

As an alternative basis for declining § 1331 jurisdiction, I note that the law of nations quite tenably does not provide these plaintiffs with any substantive right that has been violated. As I discuss at length in Section VI of this opinion, I do not believe that the law of nations, as currently developed and construed, holds individuals responsible for most private acts; it follows logically that the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal court. Thus, even if the law of nations constitutes a law of the United States, and even if § 1331 did not require that a right to sue be granted by the relevant law of the United States, plaintiffs still would have no § 1331 jurisdiction because no legal right has been violated.

ing to an inquiry about the remedies available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River, the Attorney General wrote,

> As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes *provide a right of action and a forum.* Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction "of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." . . . *I repeat that the statutes thus provide a forum and a right of action.* I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.

26 Op. Att'y Gen; 250, 252-53 (1907) (emphasis added). The opinion bolsters the view of the Second Circuit,[5] which I endorse, that section 1350 itself provides a right to sue for alleged violations of the law of nations.[6]

---

[5] The Second Circuit read § 1350 "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga,* 630 F.2d at 887. I construe this phrase to mean that aliens granted substantive rights under international law may assert them under § 1350. This conclusion as to the meaning of this crucial yet obscure phrase results in part from the noticeable absence of any discussion in *Filartiga* on the question whether international law granted a right of action.

[6] While opinions of the Attorney General of course are not binding, they are entitled to some deference, especially where judicial decisions construing a statute are lacking. *See, e.g., Oloteo v. INS,* 643 F.2d 679, 683 (9th Cir. 1981) (opinion deserves some deference); *Montana Wilderness Ass'n v. United States Forest Serv.,*

Judge Bork, in his rejection of *Filartiga*, reasons as follows: (a) international law grants plaintiffs no express right to sue in a municipal court; (b) for numerous reasons, primarily related to separation of powers, it would be inappropriate to imply one; (c) since section 1350 requires that international law give plaintiffs a cause of action, and it does not, we cannot find jurisdiction. In my view, the first two steps in the analysis are irrelevant and the third step is erroneous. The decision in *Filartiga* did not hold that, under section 1350, the law of nations must provide a cause of action—that is, a right to sue—in order to find jurisdiction. The existence of an express or implied cause of action was immaterial to the jurisdictional analysis of the Second Circuit. By focusing on this issue, Judge Bork has skirted the threshold question whether the statute even requires that the law of nations grant a cause of action. I do not believe that the statute requires such a finding, or that the decision in *Filartiga* may be lightly ignored.

At this point, it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the *Filartiga* formulation. Judge Kaufman characterized the torturer in *Filartiga* as follows: "Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890. The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies

---

496 F. Supp. 880, 884 (D. Mont. 1980) (opinions are given great weight although not binding), *aff'd in part*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 365 n. 4 (D.D.C. 1979); *cf. Blake v. Kline*, 612 F.2d 718, 724 n. 13 (3d Cir. 1979) (state attorney general opinions are entitled to great respect and should be followed where judicial decisions construing statute are lacking) (citing *In re Jackson*, 268 F. Supp. 434, 443 (E.D. Mo.), *aff'd*, 385 F.2d 775 (8th Cir. 1967)), *cert. denied*, 447 U.S. 921 (1980).

of all mankind, were susceptible to prosecution by any nation capturing them. As one writer has explained,

> Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis.*' According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character . . . . Piracy is a so-called 'international crime'; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

1 L. OPPENHEIM, INTERNATIONAL LAW § 272, at 609 (H. Lauterpacht 8th ed. 1955) (footnote omitted); *see also id.* § 151, at 339 (every state can punish crimes like piracy or slave trade on capture of the criminal, whatever his nationality); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925). Judge Kaufman did not argue that the torturer is like a pirate for criminal prosecution purposes, but only for civil actions. The inference is that persons may be susceptible to civil liability if they commit *either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law. To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent. Draft No. 3, 1982), which enumerates as violations of international law state-practiced, -encouraged or -condoned (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights. *See also* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims:*

The Alien Tort Claims Act after Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 90 (1981) (focusing on genocide, summary execution, torture and slavery as core human rights violations). I, of course, need not determine whether each of these offenses in fact amounts to a law of nations violation for section 1350 purposes. The point is simply that commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms, *see* Blum & Steinhardt, *supra*, at 87-90—and in the process are defining the limits of section 1350's reach.[7]

The *Filartiga* formulation is not flawless, however. While its approach is consistent with the language of section 1350, it places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the "law of nations"—standards of liability applicable in concrete situations. The difficult law of nations questions animating this particular case suggest the burden that would attach to each case of this kind. In the 18th century this pursuit was no doubt facilitated both by a more clearly defined and limited body of "international crimes" than exists today, and by the working familiarity of jurists with that body of law. Although I am convinced that it is possible to discover governing standards of liability, the formidable research task involved gives pause, and suggests consideration of a quite plausible alternative construction of section 1350.

---

[7] Indeed, international law itself imposes limits on the extraterritorial jurisdiction that a domestic court may exercise. It generally recognizes five theories of jurisdiction, the objective territorial, national, passive, protective and universal. RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 402 (Tent. Draft No. 2, 1981); *see also United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n. 6 (S.D. Fla. 1981). The premise of universal jurisdiction is that a state "may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern," RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED), *supra*, § 404, even where no other recognized basis of jurisdiction is present.

B. *An Alternative Approach: Municipal Law as the Standard of Liability*

Under an alternative formulation, section 1350 may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged. Unlike the first approach, set out above, the substantive right on which this action is based must be found in the domestic tort law of the United States. The text of the 1789 Judiciary Act, coupled with the concerns of 18th century legal scholars for a single judicial voice on foreign affairs, as expressed in the Federalist Papers and elsewhere, provide some support for this interpretation of the statute.[8] However, the formulation also raises a host of complex problems of its own.

1. *Historical Underpinnings*

I begin by tracing the historical setting in which the original section 1350 was drafted. The First Judiciary Act granted to circuit courts

> original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. This early grant of diversity jurisdiction opened federal courts

---

[8] One § 1350 case, discussed at length, *infra*, has adopted this framework, *see Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), and one law review note has endorsed the approach. *See* Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L. REV. 105, 123 (1979).

to civil suits by aliens, provided they were able to meet the requisite jurisdictional amount.[9] Not content to treat aliens like citizens of a non-forum state, the drafters also gave district courts concurrent original jurisdiction with both state courts and circuit courts, "as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. There is evidence, set out *infra*, that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis. If left with diversity jurisdiction alone, aliens would have to turn to state courts to bring actions below the jurisdictional amount. Concern that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin, might have led the drafters to conclude that aliens should have the option of bringing suit in federal court, whatever the amount in controversy.[10]

---

[9] Despite confusion in an early case, *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804), by 1809 it was clear that the Constitution bars extending diversity jurisdiction to suits between aliens. *See Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809).

[10] It might also be argued that § 1350 addressed actions for tortious violations only of the law of nations, not domestic law, and that the 1789 Act's grant of diversity jurisdiction covered domestic torts only. However, when the 1789 Judiciary Act was drafted, lawyers had no doubt that the law of nations was a part of the common law encompassed by the diversity jurisdiction statute. *See* Dickinson, *The Law of Nations as part of the National Law of the United States (pt. 1)*, 101 U. PA. L. REV. 26, 27 (1952); 4 BLACKSTONE'S COMMENTARIES 66-67 (Welsby ed. 1854); *see also Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116-17 (1784) (common law criminal prosecution for violation of law of nations); *cf.* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923) (arguing that federal courts were intended to assert both statutory and common law criminal jurisdiction, including over law of nations of-

The Federalist Papers demonstrate unequivocally the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field . . . ." *Hines v. Davidowitz*, 312 U.S. 52, 62 n. 9 (1941) (citing THE FEDERALIST NOS. 3, 4, 5, 42 & 80). The Constitution reflects this concern with an array of techniques for centralizing foreign relations, including Article III, § 2, which extends judicial power, *inter alia*, to controversies between a state or its citizens and foreign states, citizens or subjects.

This interest in the rights of aliens is hardly surprising when considered in the context of early American history and traditional precepts of the law of nations. Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory. 1 L. OPPENHEIM, INTERNATIONAL LAW § 165a, at 366 (H. Lauterpacht 8th ed. 1955). If the court's decision constitutes a denial of justice,[11] or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation. *See* J. BRIERLY, THE LAW OF NATIONS 284-91 (6th ed. 1963). The focus of attention, then, was on actions occurring within the ter-

---

fenses). Section 1350 therefore offered to aliens who could meet the diversity jurisdiction criteria, and therefore bring an action in the circuit court, an alternative forum, under some circumstances. For aliens unable to meet those criteria, § 1350 opened the district courts for assertion of their claims.

[11] Brierly enumerates "corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it" as instances of a denial of justice. J. BRIERLY, THE LAW OF NATIONS 287 (6th ed. 1963).

ritory of the United States, or perpetrated by a U.S. citizen, against an alien. For these acts, the United States was responsible.

Alexander Hamilton outlined precisely this fear as justification for the Constitution's grant of federal jurisdiction for all cases involving aliens:

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

THE FEDERALIST No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961).[12] Having raised the specter of war to convince his readers that "the peace of the *whole* ought not to be left at the disposal of a *part*," *id.* at 535 (emphasis in original), Hamilton considered whether he should distinguish between "cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law." *Id.* at 536. He wrote,

---

[12] Similarly, at the Virginia Convention James Madison said, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 ELLIOTT'S DEBATES 583 (1888). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & M. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17 (2d ed. 1973) (concluding that "the need for a grant [of federal judicial power] going beyond cases involving treaties and foreign representatives seems to have been undisputed"). *But see* Warren, *supra* note 10, at 56 & n.19 (1923) (among the proposed amendments to the Constitution was "the elimination of all jurisdiction based on diverse citizenship and status as a foreigner").

> The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

Id. See also Note, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L. REV. 105, 113-15 & nn.62-65 (1979). *Cf.* THE FEDERALIST No. 3 (J. Jay), No. 42 (J. Madison).[13]

The First Judiciary Act clearly did not go as far as Hamilton might have hoped. It withheld much of the judicial power that constitutionally might have been

---

[13] This formulation of § 1350's underlying intent casts doubt on the appropriateness of federal jurisdiction over suits between two aliens. The United States might be less concerned about the appearance of condoning a wrongful act if its own citizen were not the perpetrator, because the state of the wrong-doer should provide the forum for relief, or suffer the consequences. However, let us assume a tort is committed by an alien against an alien of different nationality, and the injured alien sues the offender under a state's tort law. No diversity jurisdiction exists. *See Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). A denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other. While the potential for retribution is not direct, it would seem to be present, particularly when the tort occurs on United States soil.

granted—for example, federal courts did not have complete federal question jurisdiction until 1875 [14]—and enumerated relatively narrow criteria for subject matter jurisdiction. In particular, diversity jurisdiction under the Act kept out of federal court aliens who could not plead the jurisdictional amount or complete diversity. Given the fears articulated by Hamilton and others, it is easy to speculate that the drafters were worried about possible repercussions from a state's denial of justice to an alien in any action, no matter how slight in monetary value. Recall, in this regard, Hamilton's concerns about any incident, even one "wholly relative to the *lex loci.*" THE FEDERALIST No. 80 (A. Hamilton). As Hamilton noted, whatever the fears attaching to "merely" local actions, civil suits also implicating the law of nations were surely fit for federal adjudication. Since the five hundred dollar limit created the potential for mischief by state courts, it would have been logical to place under federal jurisdiction at least the local actions most likely to create international tension. Recalling that each additional statutory grant of federal jurisdiction to lower courts was the product of struggle and compromise, *cf.* Warren, *supra* note 10, at 53-54, it would hardly be surprising that the section 1350 grant, too, reflects a compromise between, on the one hand, placing all actions involving aliens in federal courts and, on the other hand, reserving to state courts exclusive jurisdiction over all civil actions at common law and in equity.

Curiously, the language of the original section 1350, as well as its location in the Judiciary Act, can be construed to support either the *Filartiga* or the alternative formulation for the application of section 1350. As it appeared in section 9 of the 1789 Judiciary Act, the predecessor to section 1350 granted district courts jurisdiction, "concurrent with the courts of the several States,

---

[14] Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

or the circuit courts, as the case may be." [15] A logical inference is that some actions cognizable in the circuit courts also were cognizable under section 1350. The carefully delimited diversity jurisdiction of the circuit courts was set out in section 11; that section included the grant of jurisdiction, "of all suits of a civil nature at common law or in equity," in which an alien is a party, and no other grant of civil jurisdiction in actions involving

---

[15] In the First Judiciary Act, district courts were granted original jurisdiction over a mixture of actions. The complete authorization was as follows:

> Sec. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United states [sic], committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance for all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil

aliens.[16] The section 9 reference to concurrent jurisdiction with the circuit courts therefore might reasonably have referred to actions by an alien "at common law or in equity," for a tort, involving more than five hundred dollars—in other words, to domestic torts cognizable under diversity jurisdiction. However, the reference to concurrent circuit court jurisdiction might also refer to actions implicating the law of nations; both courts

---

causes of admiralty and maritime jurisdiction, shall be by jury.

1 Stat. 73, 76-77 (footnotes omitted) (emphasis added).

[16] The circuit courts received much broader original jurisdiction than the district courts. The authorization was as follows:

> Sec. 11. *And be it further enacted,* That the circuit courts shall have *original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars,* and the United States are plaintiffs, or petitioners; *or an alien is a party,* or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.

1 Stat. 73, 78-79 (footnotes omitted) (emphasis added).

would have had jurisdiction over such actions, circuit courts as an element of their common law jurisdiction, and district courts directly. In that case, the mention of concurrent jurisdiction would support the *Filartiga* formulation for the application of section 1350.

The structure of the Act also provides support for both the *Filartiga* and the alternative formulations. A comparison of district and circuit court jurisdiction discloses that while each had its own classes of cases, the circuit courts were the more significant courts of general original jurisdiction. *See* notes 15 and 16, *supra*. The district court was viewed, "primarily as [a] court[] of special jurisdiction," 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 475 (1971), and "as a very inferior court indeed." *Id.* at 473. The district court judge was to be "the resident expert" on his state's jurisprudence, *id.*, and actions placed in district courts were in essence local. Moreover, district court actions were in some respects minor versions of actions eligible to be brought in the circuit courts. Thus while the circuit courts—staffed by a district court judge and two Supreme Court Justices, pursuant to section 4 of the Act—had exclusive jurisdiction of "all crimes and offenses cognizable under the authority of the United States," with some exceptions, the district courts also had jurisdiction over less serious crimes. Similarly, the district courts could hear actions that did not meet the amount in controversy necessary for circuit court diversity jurisdiction.[17]

While the parallel between greater and lesser punishments and greater and lesser amounts in controversy might be persuasive, the district courts also had admiralty and maritime jurisdiction. That power suggests

[17] To be sure, the parallel is not perfect, since district courts could hear actions for any amount in controversy if they met the former § 1350's requirements.

these courts were not merely local petty action tribunals but important forces in the enforcement of maritime law. The drafters' decision to grant district courts admiralty jurisdiction suggests perhaps that the district courts were perceived as appropriate tribunals to handle matters affecting foreign states. It is perhaps anomalous that drafters concerned that decentralized courts might spark international conflict would place in a local court complete control over actions implicating the laws of nations, rather than using that court solely as a diversity jurisdiction catch-all. However, because district courts were located in each state, while circuit courts were scattered more sparsely, Judiciary Act of 1789, ch. 20, §§ 2-5, 1 Stat. 73, 73-75, district court jurisdiction also made federal courts more accessible to aliens, and thereby facilitated their actions.

2. *A Paradigm of the Alternative Formulation:* Adra v. Clift

To probe the mechanics of the alternative formulation for the application of section 1350, I turn to the single case in which it has been adopted. In *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), a Lebanese plaintiff, then Ambassador to Iran, sued his former wife, a Turkish-born Iraqi national resident in the United States, and her American husband under section 1350. The plaintiff contended that he was legally entitled to custody of his daughter by his former wife, that the daughter was wrongfully being withheld from him, and that defendants had concealed the child's name and nationality by falsifying her passport, in violation of the law of nations. The court found jurisdiction to exist by identifying a purely municipal tort—"[t]he unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody." 195 F. Supp. at 862. The court then determined that the defendant had misused her Iraqi passport by including her Lebanese child on it, in order to conceal the child's name and nationality. The

misuse of a passport was found to constitute a violation of the law of nations, and jurisdiction was established.

If we change the facts slightly in *Adra v. Clift*, and assume both defendants are American citizens, the case becomes a paradigm of the alternative formulation for the application of section 1350.[18] Diversity jurisdiction is unavailable if the amount in controversy is not met. The action is grounded directly on a domestic tort but implicates an international law violation. If plaintiff were denied justice, that denial might be perceived in Lebanon, plaintiff's home state, as an affront by the United States itself.

At this juncture it is worthwhile to observe that the second formulation is not susceptible of the same criticism as the first—that the district court would have difficulty parsing the law of nations for an applicable legal standard. It is apparent that because domestic law provides the standard, the burden of discovering that standard is removed. However, the *Adra* case suggests that this formulation raises some thorny questions of its own.

Under the alternative approach suggested by *Adra*, the law of nations violation is only one aspect of a multifaceted jurisdictional test and apparently need not be so rigidly defined as under the first approach adopted by *Filartiga*. The *Filartiga* formulation posits a violation of the law of nations as the trigger for section 1350 jurisdiction. The *Adra* formulation adopts a two-step jurisdictional test, requiring what would appear to be a looser allegation of a law of nations offense, coupled with a municipal tort.[19] That *Adra* eschewed the analysis that

---

[18] As noted earlier, I have some misgivings about the propriety of § 1350 actions between two aliens under this formulation. *See* note 13, *supra*.

[19] Because even under this approach the *Hanoch* plaintiffs do not allege a law of nations violation, it is unnecessary to consider

would have been required under the *Filartiga* approach, and instead spoke only in general terms about the law of nations, suggests a less rigorous showing under the law of nations would be mandated under the *Adra* approach.

The court in *Adra* might convincingly have argued that passport abuse amounts to a serious law of nations violation. The argument would be that countries are entitled, under the law of nations, to rely on passports as evidence of fact, *see Kent v. Dulles*, 357 U.S. 116, 120-21 (1958) (quoting *Urtetiqui v. D'Arbel*, 34 U.S. (9 Pet.) 692 (1835)), and that nations that do rely are responsible, also under that law, for the safe passage of the passport holder. *See* 4 BLACKSTONE'S COMMENTARIES 68-69 (Welsby ed. 1854). Fraudulent use by an individual might therefore disrupt states' recognized duties, which are grounded in reliance on a passport's authenticity. Misuse by a person entrusted to abide by international norms would amount to a law of nations violation.

The *Adra* court made no effort to tease out of international law an explicit duty, placed on individuals, that had been violated. Instead, it merely identified the important role that passports play in the international arena, implicitly concluded that the defendants were obliged by the law of nations to adhere to international norms re-

---

Article III implications of the formulation. It would appear, however, that there are no serious Article III problems associated with the *Adra*-type application of § 1350.

If § 1350 is limited to actions by aliens against citizens, *see* note 13, *supra*, then constitutional diversity jurisdiction exists.

If § 1350 is read more broadly to cover alien versus alien suits, it might still be possible to find that the action arises under the laws of the United States. This is so because the law of nations is "an ingredient" of this action, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and is also an integral part of the laws of this country, *see The Paquete Habana*, 175 U.S. 677, 700 (1900). Therefore, since any action under the *Adra* formulation would involve as a threshold issue the law of nations, it would "arise under" the laws of the United States for Article III purposes.

garding passports, and determined that their failure to do so constituted the requisite violation.

That section 1350 jurisdiction might be triggered by offenses less severe than are required under the *Filartiga* formulation gives rise to a new question: how much less severe? No doubt the law of nations condemns passport violations; whether they reach the level of international crimes is another matter entirely. Perhaps the two approaches focus on different segments of the spectrum of international offenses. In the range from the petty to the heinous, the first formulation might look to the upper range only—to those acts that are recognized as international crimes—while the second might encompass a wider scope. It might, for example, refer to a violation of any of the many duties imposed on nations by international law, as set out in detail in the Restatement (Second) of Foreign Relations Law. That is an issue with which any future court accepting the *Adra*-type formulation must grapple, however. I need not test the limits of each standard, for while I have no doubt that the official torture cited in *Filartiga* violated the law of nations by any definition, I am not convinced that the unofficial acts at issue in this case in any way implicated the law of nations.

I note, however, that it is thoroughly inconsistent with the impetus behind section 1350 under the *Adra* formulation—to keep the United States *out* of international confrontations—to construe the statute to enable courts to burrow into disputes wholly involving foreign states. I therefore believe the *Adra* formulation makes sense only if construed to cover actions by aliens for domestic torts that occur in the territory of the United States and injure "substantial rights" under international law, *see* 26 Op. Att'y Gen. 250, 252-53 (1907), or for universal crimes, as under the first formulation, or for torts committed by American citizens abroad, where redress in American courts might preclude international repercussions.

Not surprisingly, these limits are consistent with the basic parameters that international law establishes for a domestic court's exercise of jurisdiction over extraterritorial activities. *See* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) §§ 402-404 (Tent. Draft No. 2, 1981) (enumerating permissible bases of "jurisdiction to prescribe," applicable both to criminal and civil law). They are not, contrary to Judge Bork's assertion, my own "unguided policy judgments," but rather the well-established, prudential judgments of the law of nations. Of course, other municipal law doctrines pertaining to a court's exercise of jurisdiction, such as *forum non conveniens* and attainment of personal jurisdiction, must be met as well.

A second difficult question raised by the facts in *Adra* involves the requisite nexus between the domestic and the international tort. The *Adra* court applied, at best, a "but for" causation test to determine whether the international and domestic torts were sufficiently related to establish jurisdiction. "But for" the passport abuse, defendants could not have concealed the daughter's entry into the United States, and therefore could not have retained custody. This framework opens the courts to a potential deluge of actions. In this case, for example, plaintiffs might have alleged that the PLO violated Israeli immigration laws by landing in Israel without passports, perhaps skirting the problem, addressed *infra*, of individual liability for torture. The formulation poses the difficult question of the necessary degree of convergence between the domestic and international tort. Had I to address the issue, I would recall my basic premise—that the intent of the statute was to avoid or mitigate international conflict—and determine what degree of overlap would be required to achieve that goal. However, since the *Hanoch* plaintiffs focus on one event alone, the issue is not directly presented.

C. *A Summary Comparison of the* Filartiga *and* Adra *Formulations*

From the foregoing analysis it is clear that the *Filartiga* and *Adra* formulations might produce radically different results. *Adra v. Clift* itself is an example. Under its facts, jurisdiction would fail under the *Filartiga* formulation, because the law of nations violation, even if sufficiently severe, caused plaintiff no harm, and plaintiff could not sue under section 1350 for the domestic tort. In contrast, the facts of *Filartiga* would likely produce a finding of jurisdiction under either the *Filartiga* or *Adra* formulation. Whatever the difference in the formulations, however, they do have in common one crucial characteristic: under neither one must plaintiffs identify and plead a right to sue granted by the law of nations. On that point, I espy no reason in the statutory language, history, or case law to conclude otherwise.

IV. Meaning of the "Law of Nations"

In addition to our disagreement over the "right to sue" issue, I also have great difficulty in understanding Judge Bork's effort to restrict the scope of section 1350 to the principal offenses against the law of nations recognized centuries ago by Blackstone, *see* text at notes 2-3, *supra*, instead of construing it in accord with the current definition of the law of nations. While conceding that the legislative history offers no hint of congressional intent in passing the statute, my colleague infers Congress' intent from the law of nations at the time of the passage of section 1350. The result of this analytical approach is to avoid the dictates of *The Paquete Habana* and to limit the "law of nations" language to its 18th century definition. In *The Paquete Habana*, the Supreme Court noted that, in construing the "law of nations,"

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized

> nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700. As was pointed out in *Filartiga*,

> *Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." *Id.* at 694, 20 S.Ct. at 297; *accord, id.* at 686, 20 S.Ct. at 297. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

630 F.2d at 881.

In light of the evidence at hand, it seems clear beyond cavil that violations of the "law of nations" under section 1350 are not limited to Blackstone's enumerated offenses. Indeed, the Supreme Court stated as much almost a century ago, when it announced that counterfeiting of foreign securities constitutes an offense against the law of nations. *See United States v. Arjona*, 120 U.S. 479 (1887).

V. The Duty to Exercise Jurisdiction

To the extent that Judge Bork rejects the *Filartiga* construction of section 1350 because it is contrary to his perception of the appropriate role of courts, I believe he

is making a determination better left to Congress. It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute. If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions "exacerbate tensions" and should not be heard.

To be sure, certain judge-made abstention rules, such as the Act of State Doctrine, require courts to decline to reach certain issues in certain instances, notwithstanding a statutory grant of jurisdiction. Where the Act of State Doctrine applies, the Supreme Court has directed the courts not to inquire into the validity of the public acts of a *recognized* foreign sovereign committed *within its own territory. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The doctrine does *not* require courts to decline jurisdiction, as does the Foreign Sovereign Immunities Act, but only not to reach the merits of certain issues. As Judge Bork admits, the doctrine is not controlling here. Indeed, to apply it at this stage of the case would be to grossly distort the doctrine, first by considering it as a jurisdictional issue, and second, by extending it beyond its carefully limited confines. Unless and until the Supreme Court reconsiders the Act of State Doctrine and applies it as a jurisdictional matter to acts by non-recognized entities committed in the territory of a recognized state, it simply is not relevant to this case.

While not claiming that the Act of State Doctrine controls, Judge Bork looks for guidance toward the concerns that he believes animate it. To ignore the Supreme Court's cautious delineation of the doctrine in *Banco Nacional de Cuba v. Sabbatino* and its progeny, and to cite the doctrine's rationale as broad justification for effectively nullifying a statutory grant of jurisdiction, is, to my view, an inappropriate exercise of lower federal court power. It is particularly so in this case, given the

considerable disagreement among the Justices regarding the rationale, scope, and flexibility of the doctrine, *see First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773-76 (1972) (Powell, J., concurring in judgment), and congressional efforts to override judicial abdication of the kind directed by the Act of State Doctrine. *See* 22 U.S.C. § 2370(e) (1976) (barring judicial invocation of Act of State Doctrine in certain expropriation actions).

My troubles with Judge Bork's efforts to limit the reach of section 1350 go even deeper. Contrary to my colleague's intimations, I do recognize that there are separate branches of Government. In fact, that is precisely my point. I am the first to admit that section 1350 presents difficulties in implementation, but to construe it out of existence on that ground is to usurp Congress' role and contravene its will.

Judge Bork virtually concedes that he is interposing a requirement that the law of nations provide a right to sue simply to void a statute of which he does not approve—and to avoid having to extend and distort existing doctrine on nonjusticiability to reach the same result. As a first step, he sets forth an interpretation of the statute that completely writes out of the statute the clause at issue. The law of nations provides no private right to sue for the only offenses against the law of nations that he recognizes. Under his view, therefore, the clause in the statute had no meaning when passed by Congress and none today. To enforce a construction that yields that result is not only to insult Congress, but inappropriately to place judicial power substantially above that of the legislature.

Logically, of course, under Judge Bork's formulation, were the law of nations ever to provide a right to sue, federal courts would have to hear the cases. To avoid this

contingency, Judge Bork adds yet another obstacle, stating that "considerations of justiciability" would, necessarily, come into play in that event. With this remark, Judge Bork virtually concedes that he would keep these cases out of court under any circumstance, and he places himself squarely beside Judge Robb, who advocates dismissal of this action on political question grounds. Vigorously waving in one hand a separation of powers banner, ironically, with the other he rewrites Congress' words and renounces the task that Congress has placed before him.

Most surprisingly, Judge Bork's analysis—and his critique of my own—*completely* overlooks the existence of state courts. Subject to the same constraints that face federal courts, such as personal jurisdiction, and perhaps in some instances to other limitations, such as preemption, state courts could hear many of the common law civil cases, brought by aliens, that Judge Bork believes should not be heard at all. As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist—as Judge Bork assumes—but to provide an *alternative* forum to state courts. Indeed, the Supreme Court has at least twice cited section 1350 as a statutory example of congressional intent to make questions likely to effect foreign relations originally cognizable in federal courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 & n.25 (1964); *Ex Parte Quirin*, 317 U.S. 1, 27-30 & n.6 (1942). Not only is it patently indefensible to ignore this mandate. It is also erroneous to assume that the troublesome cases will disappear altogether from state courts, as well as federal, if section 1350 becomes mere historical trivia. In that event, no doubt, my colleagues would either assert nonjusticiability generally or turn the issue on its head and argue, precisely as the section 1350 drafters recognized, that state courts are inappropriate fora for resolution of issues implicating foreign affairs.

VI. Liability of the Non-State Actor Under the Law of Nations

While I endorse the legal principles set forth in *Filartiga*, I also believe the factual distinctions between this case and the one faced by the Second Circuit mitigate its precedential value in this case. To be sure, the parallels between the two cases are compelling. Here, as in *Filartiga*, plaintiffs and defendants are both aliens. Plaintiffs here allege torture in their complaint, as did plaintiffs in *Filartiga*.[20] Here, as in *Filartiga*, the action at issue undoubtedly violated the law of the nation in which it occurred (in this case, the law of Israel). *See Filartiga*, 630 F.2d at 889.

The two fact patterns diverge, however, on the issue of *official torture*. The Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law. In contrast, the Paraguayan

---

[20] On the basis of international covenants, agreements and declarations, commentators have identified at least four acts that are now subject to unequivocal international condemnation: torture, summary execution, genocide and slavery. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 90 (1981); *see also* P. Sieghart, The International Law of Human Rights 48 (1983) (cataloguing as recognized international crimes certain war crimes, crimes against humanity, genocide, apartheid and, increasingly, torture). Plaintiffs in this action allege both torture and murder that amounts to summary execution. *Filartiga* accepted the view that official torture in fact amounts to a law of nations violation. Analysis along the same lines would likely yield the conclusion that state-sponsored summary executions are violations as well. However, by definition, summary execution is "murder conducted in uniform," as opposed to lawful, state-imposed violence, Blum & Steinhardt, *supra*, at 95, and would be inapplicable here. *See id.* at 95-96. Therefore, for purposes of this concurrence, I focus on torture and assume, *arguendo*, that torture amounts to a violation of the law of nations when perpetrated by a state officer. I consider only whether non-state actors may be held to the same behavorial norms as states.

official in *Filartiga* acted under color of state law, although in violation of it. The Second Circuit surveyed the law of nations and concluded that *official torture* constituted a violation. Plaintiffs in the case before us do not allege facts to show that official or state-initiated torture is implicated in this action. Nor do I think they could, so long as the PLO is not a recognized member of the community of nations.[21]

---

[21] Our courts have in the past looked to the foreign policy of this nation, in particular to the recognition or non-recognition of a foreign government, to determine the applicability of a given legal doctrine. For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court explicitly tied the application of the Act of State Doctrine to whether the foreign state was recognized by the United States. *See* 376 U.S. at 401, 428. *See also Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (Supreme Court takes judicial notice of Washington's recognition of Mexican government, applies Act of State Doctrine retroactively to pre-recognition incidents). Indeed, the Court has made clear that the judiciary is not to second guess the determination of the other branches as to "[w]ho is the sovereign, *de jure* or *de facto*, of a territory." *Oetjen*, 246 U.S. at 302. We therefore are bound by the decision of the Executive not to recognize the PLO, and we must apply international law principles accordingly.

I note, however, that it is conceivable that a state not recognized by the United States is a state as defined by international law and therefore bound by international law responsibilities. To qualify as a state under international law, there must be a people, a territory, a government and a capacity to enter into relations with other states. *See* 3 U.N. SCOR (383d Mtg.) at 9-12, U.N. Doc. S/P.V. 383, pp. 21-35 (1948) (remarks of Professor Philip C. Jessup advocating Israeli membership in the United Nations), *quoted in* Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AM. J. INT'L L. 288, 300 (1949). Jurisdiction over the territory must be exclusive. G. VON GLAHN, LAW AMONG NATIONS 62 (4th ed. 1981). Even assuming, *arguendo*, that the law of nations obligates unrecognized states that meet this standard, and that § 1350's intent was to hold liable even those states the U.S. does not recognize, there is no allegation here that the PLO does or could meet this standard.

A. *The Lack of Consensus on Individual Responsibility*

The question therefore arises whether to stretch *Filartiga*'s reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law. The extension would require this court to venture out of the comfortable realm of established international law—within which *Filartiga* firmly sat—in which states are the actors.[22] It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. Would terrorists be liable, because numerous international documents recognize their existence and proscribe their acts? *See generally* R. LILLICH, TRANSNATIONAL TERRORISMS: CONVENTIONS AND COMMENTARY (1982) (reprinting numerous international anti-terrorism accords); *see also* Lauterpacht, *The Subjects of the Law of Nations (pt. 1)*, 63 L.Q. REV. 438, 444-45 (discussing international obligations of insurg-

---

[22] Classical international law was predominantly statist. The law of nations traditionally was defined as "the body of rules and principles of action which are binding *upon civilized states* in their relations with one another." J. BRIERLY, *supra* note 11, at 1 (emphasis added); *see also* G. VON GLAHN, *supra* note 21, at 61-62; 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 2A, at 4 (2d ed. rev. 1945). Non-state actors could assert their rights against another state only to the extent that their own state adopted their claims, and as a rule they had no recourse against their own government for failure to assist or to turn over any proceeds. 1 C. HYDE, *supra*, § 11B, at 36. *See also* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 9 (1982). That the International Court of Justice permits only party-states to appear in cases before the court highlights this outlook. Article 34(1), Statute of the International Court of Justice, *done* June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153 (entered into force for United States October 24, 1945).

ents). Would all organized political entities be obliged to abide by the law of nations? Would *everybody* be liable? As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point. Therefore, heeding the warning of the Supreme Court in *Sabbatino*, to wit, "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it," 376 U.S. at 428. I am not prepared to extend the definition of the "law of nations" absent direction from the Supreme Court. The degree of "codification or consensus" is simply too slight.

While I do not believe that international harmony exists on the liability of private individuals, it is worth noting that a number of jurists and commentators either have assumed or urged that the individual is a subject of international law. *See Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (violation of law of nations, in section 1350, means, "at least a violation by one or more individuals"); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (individual violation of law of nations); Judgment of the International Military Tribunal, 22 Trial of the Major War Criminals Before the International Military Tribunal, Proceedings, 411, 465-66 (1948), 41 AM. J. INT'L L. 172, 220-21 (1947) (international law "imposes duties and liabilities upon individuals as well as upon States"), *reprinted in* The Nuremberg Trial 1946, 6 F.R.D. 69, 110-11 (1947); G.A. Res. 95, U.N. Doc. A/64/Add. 1, at 188 (1947) (affirming Nuremberg principles); *see also* Sohn, *supra* note 22, at 9-11 (summarizing shift since 1945 in individual rights and duties under international law); Note, *The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350*, 1 B.C. INT'L & COMP. L.J. 71, 82 (1977). Confusion

arises because the term "individual liability" denotes two distinct forms of liability. The first, now well-implanted in the law of nations, refers to individuals acting under color of state law. Commentators routinely place the origin of this development at the Nuremberg Trials, *see, e.g.*, Sohn, *supra* note 22, at 9-11, and it was in this context that the International Military Tribunal wrote of individual responsibility for war crimes.[23] The second, currently less-established meaning addresses the responsibility of individuals acting separate from any state's authority or direction. That the defendant in *Filartiga* was an official, not the state itself, placed him squarely within the first meaning. In contrast, in the case before us, the second formulation of individual liability is at issue.

Even in the truly private arena there is support for the concept of individual responsibility. Inferences from case law suggests that courts over the years have toyed with the notion of truly individual liability both under section 1350 and more generally. Section 1350 case law, unfortunately, is sparse. Other than *Filartiga*, only two cases brought under section 1350 have established jurisdiction. Both involved private-party defendants. In one, *Bolchos v. Darrell*, 3 Fed. Cas. 810 (D.S.C. 1795) (No. 1607), a predecessor to section 1350 provided jurisdiction for an action, grounded on a treaty violation, involving a title dispute concerning neutral property on a captured enemy vessel. It is worthwhile to note that, although *Bolchos* involved a treaty obligation, at the time of the *Bolchos* case individual defendants were in fact found to violate the law of nations, although not necessarily in actions based on section 1350. *See, e.g., United States v.*

---

[23] For example, responding to a "following orders" defense, the court cited Article 8 of the Charter annexed to the agreement establishing the Nuremberg Tribunal, which declared, "The fact that the defendant acts pursuant to orders of his Government or a superior shall not free him from responsibility, but may be considered in mitigation of punishment." 6 F.R.D. at 110-11.

Smith, 18 U.S. (5 Wheat.) 153 (1820) (indictment for crime of piracy, as defined by the law of nations). In a more recent case, *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), an individual was in fact found to have violated the law of nations, and section 1350 jurisdiction was thereby established. The action, discussed extensively, *supra*, involved a child custody suit between two aliens; the court found that defendant's wrongful withholding of custody was a tort and that her misuse of passports to bring the child into the United States violated international law. To reach this conclusion on individual responsibility, the court relied primarily on one commentator, who asserted that some acts violate the law of nations and may be prosecuted when committed by a private offender, *Adra*, 195 F. Supp. at 863-64 (citing 1 C. HYDE, *supra* note 22, § 11A, at 33-34); it then leapt to a conclusion that passport violations are among such acts. *Id.* at 864-65. As I shall demonstrate, *infra*, Hyde's position, while certainly compelling, is not so widely accepted doctrinally or practically as to represent the consensus among nations.[24]

---

[24] Three other cases have suggested jurisdiction might be available under § 1350. Of these, two implicated private defendants. In *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975), an action against the Immigration and Naturalization Service and others alleging the illegal seizure and removal of Vietnamese babies from Vietnam in the final hours of U.S. involvement there, the court noted in dicta that jurisdiction might be available under § 1350, and that, if it were, private adoption agencies that participated in the "babylift" might be joined as joint tortfeasors. *Id.* at 1201 n.13. In a 1907 Opinion, 26 Op. Att'y Gen. 250 (1907), the Attorney General indicated that a predecessor to § 1350 might provide a forum to Mexican citizens seeking redress for damages suffered when an American irrigation company altered the channel of the Rio Grande River. The third case, *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908), suggests that a United States officer's seizure of an alien's property in a foreign country might fall within § 1350.

Numerous other § 1350 actions have been dismissed on jurisdictional grounds for failure to allege a violation of the law of

B. *Historical Evolution of the Role of the Individual in International Law*

That the individual's status in international law has been in flux since section 1350 was drafted explains in part the current mix of views about private party liability. Through the 18th century and into the 19th, writers and jurists believed that rules of international law bound individuals as well as states. *See, e.g., United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy violates law of nations; individual liable); *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784) (assault on French consul-general violates law of nations; individual liable); 4 BLACKSTONE'S COMMENTARIES 66-73 (Welsby ed. 1854) (recounting various offenses against law of nations, committed by private persons, punishable under English statutory law); *see generally* Dickinson, *supra* note 10, at 26-27, 29-30; Dickinson, *The Law of Nations as Part of the National Law of the United States (pt. 2)*, 101 U. PA. L. REV. 792, 792-95 (1953); Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956). In the 19th century, the view emerged that states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations. Under that view—which became firmly entrenched both in doctrine and in practice, *see* Korowicz, *supra*, 50 AM. J. INT'L L. at 535, 541—individual rights existed only as rights of the state, *see* Lauterpacht, *The Subjects of the Law of Nations (pt. 1)*, 63 L.Q. REV. 438, 439-40 (1947), and could be asserted, defended or withdrawn by

---

nations, *see generally* Annot., 34 A.L.R. FED. 388 (1977) (reviewing cases). The most common shortcoming of these actions is in the allegation of a municipally recognized tort, such as fraud, *Trans-Continental Inv. Corp., S.A. v. Bank of Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980), or libel, *Akbar v. New York Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1980), that does not have the stature of a law of nations violation.

the state. *See* P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 38 (1960); *see also* note 22, *supra*.

In this century, once again writers have argued that both the rights and duties of international law should be applied to private parties. *See* P. REMEC, *supra*, at 8-18; Hill, *International Affairs: The Individual in International Organization*, 28 AM. POL. SCI. REV. 276, 282 & nn.20-23 (1934) (describing shift from statism and emergence of view that individual is subject of international law); Korowicz, *supra*, 50 AM. J. INT'L L. at 537-39 (observing trend toward recognition of international personality of individuals, especially in their assertion of rights). However, their discussions are more prescriptive than descriptive; they recognize shifts in firmly entrenched doctrine but are unable to define a clear new consensus. And for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go. *See, e.g.*, Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435 (1964).

C. *Whether Torture, Like Piracy, Is an Exception to the Rule*

One strand of individual liability apparently survived the 19th century swing toward statism—private responsibility for piracy. It remained, with only a handful of other private acts, such as slave trading, as a confutation of the general principle of statism. *See* Korowicz, *supra*, 50 AM. J. INT'L L. at 545, 558; *cf.* Lauterpacht, *The Subjects of the Law of Nations (pt. 2)*, 63 L.Q. REV. 438, 441-42. Explanations of the basis for this continued recognition of individual responsibility vary. In one view, these acts are private violations of the law of nations, *e.g.*, *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820). In another view, international law

merely authorizes states to apply sanctions of their municipal law, whatever the nationality of the offender. "The state of the offender is not authorized to apply normal consular or diplomatic protection. International provisions against [acts such as piracy] . . . allow the state which captures the offenders to proceed according to its own internal law." Korowicz, *supra*, 50 AM. J. INT'L L. at 545. *See also Harvard Research in International Law, Piracy*, 26 AM. J. INT'L L. SUPP. 739, 754, 759-60 (1932) (piracy a special ground of state jurisdiction); *see generally* Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925) (discussing doctrinal confusion about piracy as an international or municipal crime).

It is worthwhile to consider, therefore, whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility. Definitions of torture set out in international documents suggest it is not. For example, torture is defined in the Draft Convention on the Elimination of Torture in part as any act "by which severe pain or suffering" is inflicted, "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/L 1576) of 6 March 1981, *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. Similarly, the United Nations General Assembly definition requires that the actor be "a public official." *See* Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91-92, U.N. Doc. A/10034 (1975), *reprinted in* P. SIEGHART, *supra* note 20, § 14.3.5, at 162. *See also* Blum & Steinhardt, *supra* note 20, at 93, 95-96. Against this background, I do

not believe the consensus on non-official torture warrants an extension of *Filartiga*. While I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term "law of nations."

VII. Terrorism as a Law of Nations Violation

I turn next to consider whether terrorism is itself a law of nations violation.[25] While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.

To witness the split one need only look at documents of the United Nations. They demonstrate that to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation. For example, a resolution entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes," G.A. Res. 3103, 28 U.N. GAOR at 512, U.N. Doc. A/9102 (1973), declared:

> The struggle of peoples under colonial and alien domination and racist regimes for the implementa-

---

[25] At least one law review note has suggested that we decide this case in favor of plaintiffs by identifying terrorism as a law of nations violation. *See* Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. 236 (1982).

> tion of their right to self-determination and independence is legitimate and in full accordance with the principles of international law.

It continued that armed conflicts involving such struggles have the full legal status of international armed conflicts, and that violation of that status "entails full responsibility in accordance with norms of international law." *Id.* at 513. *See also* Definition of Aggression, G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142-44, U.N. Doc. A/9631 (1974) (nothing in definition of term "aggression" should prejudice right of self-determination or struggle, particularly of peoples under "colonial and racist regimes or other forms of alien domination"). In contrast, there is of course authority in various documents and international conventions for the view that terrorism is an international crime. Many Western nations condemn terrorist acts, either generally, as in the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance,[26] or with reference to particular terrorist acts, as in the International Convention Against the Taking of Hostages,[27] or the Hague Convention on the Suppression of Unlawful Seizure of Aircraft.[28] *See also* R. FRIEDLANDER, TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL 38 (1983) (describing the international division on the legitimacy of terrorist acts); *see generally* R. LILLICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY (1982).

---

[26] Signed Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (entered into force for United States Oct. 20, 1976).

[27] Adopted Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/819 (1979).

[28] Signed Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force for United States Oct. 18, 1971).

The divergence as to basic norms of course reflects a basic disagreement as to legitimate political goals and the proper method of attainment. Given such disharmony, I cannot conclude that the law of nations—which, we must recall, is defined as the principles and rules that states feel themselves bound to observe, and do commonly observe [29]—outlaws politically motivated terrorism, no matter how repugnant it might be to our own legal system.

VIII. My Colleagues' Opinions

My colleague Judge Robb argues that this case is a nonjusticiable "political question" and that it therefore was properly dismissed. With all due respect, I disagree with this approach to appellate adjudication. A judge should not retreat under facile labels of abstention or nonjusticiability, such as the "political question doctrine," merely because a statute is ambiguous. In the words of one eminent jurist, "[o]*bscurity of statute* or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and *cast a duty upon the courts to declare it* retrospectively in the exercise of a power frankly legislative in function." B. Cardozo, The Nature of the Judicial Process 128 (1921) (emphasis added). Or, as another jurist framed the issue, "The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947).

Nonjusticiability based upon "political question" is *at best a limited* doctrine, and it is wholly inapposite to this case. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that the question whether a state legislative

---

[29] 1 C. Hyde, *supra* note 22, at 1.

district apportionment plan violates the Constitution is not a political question and therefore not nonjusticiable. In so doing, the Court rejected the notion that the doctrine rendered nonjusticiable all "political cases"—a doctrine advanced by Justice Frankfurter writing for a plurality of the Court in *Colegrove v. Green*, 328 U.S. 549 (1946). Instead, it observed, the nonjusticiability of a question is "essentially a function of the separation of powers." 369 U.S. at 217. The Court then identified several categories of political questions:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The opinion also observed that the doctrine in no respect requires that all questions implicating foreign affairs be ruled political questions. *Id.* at 211.

Subsequently Justice Brennan, the author of *Baker v. Carr*, emphasized the narrowness of the political question doctrine as it applies to matters of foreign relations. Dissenting in *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979)—in which only four Justices agreed that a Congressman's challenge to the President's Taiwan treaty termination presented a nonjusticiable political question—Justice Brennan explained, "Properly understood, the political-question doctrine restrains courts from reviewing

an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'" *Id.* at 1006 (quoting *Baker v. Carr*, 369 U.S. 186, 211-13 (1962) (brackets in original). I simply do not believe that the doctrine in either of these narrow formulations counsels a finding of nonjudiciability in this case.

Initially, the action before us does not implicate separation of powers principles, and therefore is not even related to the central concern of the political question doctrine. *See Baker v. Carr*, 369 U.S. at 210, 217. We have here no clash between two branches of government that requires us to resolve the apportionment of power between them. Nor do we potentially transgress by reviewing any exercise of authority by another branch of government, much less one committed to another branch by the Constitution. Far from it, in fact; in implementing section 1350, courts merely carry out the existing view of the legislature that federal courts should entertain certain actions that implicate the law of nations.[30] More-

---

[30] To the extent that Judge Robb's reliance on political question principles arises from his concern about court intervention in foreign affairs, the Act of State Doctrine delineates the bounds of proper judicial restraint. The doctrine arises in cases which, under Judge Robb's formula, would be deemed political question cases. Yet, we cannot ignore the fact that they are not treated as political question cases and ruled nonjusticiable.

The doctrine applies only to judicial review of the acts of *recognized* foreign governments committed *within their own territory. See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). It is, in effect, a doctrine of deference, requiring that courts not second-guess the judgments of such sovereigns in a category of contexts. When a § 1350 action implicates such action by a recognized sovereign, the Act of State Doctrine might bar further inquiry. Such is not the case here. Similarly, the Foreign Sovereign Immunities Act restrains courts from asserting jurisdiction, but again, only to the extent Congress has deemed appropriate. Considering that the Supreme Court—in the Act of State Doctrine—and the Congress—in the Foreign Sovereign Immunities

over, none of the categories identified in *Baker* is applicable here. We do not lack judicially discoverable and manageable standards. The parties do not invoke constitutional or statutory provisions that resist judicial application. The Supreme Court, in *The Paquete Habana*, explicitly acceded to the task of applying the law of nations and instructed lower courts on how to approach the task of discovering it. I therefore can hardly conclude that courts *lack* the means of determining what standards to apply. That the task might be difficult should in no way lead to the conclusion that it should not be accomplished. Nor do I believe either that any of the other concerns in *Baker* arise here.[31]

I note, in addition, that to expand the doctrine at this juncture would be to counter the movement of courts and scholars in the opposite direction. Indeed, commentators have noted the "judicial indifference and scathing schol-

---

Act—have each delimited the scope of necessary judicial restraint in cases involving foreign affairs, I am not inclined to fashion yet another doctrine of nonjusticiability simply because this case, and the intricacies of the law of nations, are not of easy resolution or implicate foreign affairs generally.

[31] This case therefore is distinguishable from *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), in which a panel of this court recently affirmed the dismissal of an action on political question grounds. In *Crockett*, we held that the inquiry into whether United States advisers stationed in El Salvador were in a situation of imminent hostilities was beyond the fact-finding power of this court and hence constituted a political question. That case, unlike this one, involved the apportionment of power between the executive and legislative branches. The case was brought by a group of Congressmen challenging the President's failure to report to Congress under the War Powers Resolution. Our opinion adopted that of the District Court, which had articulated an extremely narrow view of the political question doctrine. Even within that narrow view, it was apparent that *Baker v. Carr's* category of "judicially discoverable and manageable standards" would bar judicial interference in the dispute between the two branches. Here we have no such dispute and no such fact-finding problems and, therefore, no legitimate grounds for a finding of nonjusticiability.

arly attack" recently directed at the political question doctrine, *see* McGowan, *Congressmen in Court*, 15 GA. L. REV. 241, 256 (1981). As Judge McGowan has noted, other than the Taiwan treaty case, *Goldwater v. Carter*, 444 U.S. 996 (1979), the last Supreme Court case to cite the doctrine in any meaningful way was *Gilligan v. Morgan*, 413 U.S. 1 (1973), and the last Supreme Court case to rely squarely on it was *Colegrove v. Green*, 328 U.S. 549 (1946). *See* McGowan, *supra*, at 256-57.

It is therefore clear that the political question doctrine is a very limited basis for nonjusticiability. It certainly does not provide the judiciary with a carte blanche license to block the adjudication of difficult or controversial cases. And the doctrine surely may not be employed here to vitiate section 1350.

I decline to address further Judge Bork's critique of my opinion. He has completely misread my opinion to say that the primary purpose of section 1350 was to authorize courts to "regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States." I only wish the issues posed were so simple. Judge Bork seriously distorts my basic premises and ignores my expressed reservations. Accordingly, I prefer to let this opinion speak for itself, in the belief that it belies my colleague's mischaracterizations, and that any further exposition would be redundant.

IX. CONCLUSION

In light of the foregoing, I conclude that the appellants have not, and could not, allege facts sufficient to remain in court under existing precedent. I therefore vote to affirm the District Court's dismissal for lack of subject matter jurisdiction.

BORK, *Circuit Judge, concurring*: This case grows out of an armed attack on a civilian bus in Israel on March 11, 1978. Appellants (plaintiffs below) are sixty-five of the persons seriously injured in the attack and the survivors of twenty-nine of the persons killed. Appellees (defendants below) are the Libyan Arab Republic ("Libya"), the Palestine Liberation Organization ("PLO"), the Palestine Information Office ("PIO"), and the National Association of Arab Americans ("NAAA").[1] Appellants alleged in their complaint that appellees were responsible for the 1978 attack, and they sought compensatory and punitive damages. Specifically, appellants charged appellees with torts committed in violation of international law and of some treaties and statutes of the United States as well as with commission of and conspiracy to commit various intentional common law torts. Jurisdiction over the common law tort counts is pendent and will fail if the other counts fail.

The district court dismissed the action for lack of subject matter jurisdiction.[2] *Hanoch Tel-Oren* v. *Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981). We agree that the complaint must be dismissed, although our reasons for agreement differ. I believe, as did the district court, that, in the circumstances presented here, appellants have failed to state a cause of action sufficient to support jurisdiction

---

[1] Appellants have not pursued the appeal against a fifth defendant named in the complaint, the Palestine Congress of North America ("PCNA").

[2] The district court dismissed the action against all defendants on the alternative ground that it was barred by the local one-year statute of limitations for certain torts. D.C. Code Ann. § 12-301(4) (1981). *Hanoch Tel-Oren* v. *Libyan Arab Republic*, 517 F. Supp. 542, 550-51 (D.D.C. 1981). Because we agree that the complaint was properly dismissed on other grounds, we need not reach this ground. Nor need we reach the district court's dismissal of the action against the NAAA and PIO (as well as the PCNA) on the ground that the allegations of the complaint were insufficiently specific. *See* note 4 *infra*.

under either of the statutes on which they rely. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981).[3] Neither the law of nations nor any of the relevant treaties provides a cause of action that appellants may assert in courts of the United States. Furthermore, we should not, in an area such as this, infer a cause of action not explicitly given. In reaching this latter conclusion, I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations.

I.

According to the complaint, on March 8, 1978, thirteen heavily armed members of the PLO left Lebanon for Israel. They were under instructions from the PLO to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel jails. If their plans broke down, the terrorists were to kill their hostages.

The complaint's allegations of what happened upon the terrorists' arrival in Israel constitute a tale of horror. Since my analysis does not turn upon the particulars of those events, they need not be described in detail. The thirteen terrorists landed by boat and, after killing an American photographer they encountered on the beach, made their way to the main highway betwen Haifa and Tel Aviv. There they stopped and seized a civilian bus, a taxi, a passing car, and, later, a second civilian bus, taking the passengers hostage. While proceeding toward Tel Aviv with their many hostages gathered in the first bus, the terrorists fired on and killed numerous occupants of passing cars as well as some of their own passengers. They also tortured some of their hostages.

---

[3] In the district court, appellants also argued that jurisdiction rested on 28 U.S.C. § 1330 (1976) (Foreign Sovereign Immunities Act) and on 28 U.S.C. § 1332 (1976) (diversity). The district court rejected both grounds of jurisdiction, 517 F. Supp. at 549 n.3, and appellants have abandoned them on appeal.

The police finally brought the terrorist-controlled bus to a halt by shooting at the tires and engine of the bus as it passed through a police barricade. The terrorists reacted by shooting a number of their hostages and, eventually, by blowing up the bus with grenades. As a result of the terrorists' actions, twenty-two adults and twelve children were killed, and sixty-three adults and fourteen children were seriously wounded.

Appellants in this case are most of those wounded and the survivors of most of those killed, as well as the guardians and next friends of those wounded minors who may not sue in their own capacity. Appellants alleged their complaint that appellees are responsible for the deaths and injuries. According to the complaint's allegations, the PLO not only recruited and trained the thirteen terrorists but also planned, financed, supplied, and "claimed responsibility" for the operation. Libya, plaintiffs alleged, trained the PLO instructors who trained the thirteen terrorists, planned, supplied, financed, and "claimed responsibility" for the operation, and gave an official "hero's welcome" to the ship that carried the terrorists to Israel. As for the PIO and the NAAA, the complaint contains only the general allegations that the PIO is an agent and the instrumentality of the PLO and that both the PIO and the NAAA helped plan, finance, outfit, and direct the terrorist operation.[4]

Though the complaint sought recovery under five theories of liability, only two need be considered to decide this appeal. Count II charges defendants with tortious actions in violation of the law of nations. Count III charges defendants with tortious actions in violation

---

[4] The district court found the complaint's allegations against the PIO and the NAAA (and against the PCNA) insubstantial, vague, and devoid of any factual detail. It therefore held those allegations insufficient to support a tort action for damages. 517 F. Supp. at 549.

of various treaties of the United States.[5] The district court granted the NAAA's motion to dismiss for lack of jurisdiction. The portion of the district court's inquiry that is relevant here is whether the allegations of Counts II and III sufficed to support jurisdiction under sections 1331 or 1350.

Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1350 provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." With respect to Count III's allegation of treaty violations, the district court found jurisdiction lacking on the ground that none of the treaties alleged to be violated either expressly or impliedly gave rise to a private right of action. 517 F. Supp. at 545-48. With respect to Count II's allegation that appellees violated the law of nations, the district court held that neither section 1331 nor section 1350 provided jurisdiction. Section 1331 jurisdiction is lacking, the court held, because federal common law, which incorporates the law of nations, cannot be constituted to grant a cause of action without "judicial interference

---

[5] Count I charges defendants with the torts of assault, battery, false imprisonment, and intentional infliction of mental distress; it also charges defendants with a tort it describes as the intentional infliction of cruel, inhuman, and degrading treatment. Count IV charges defendants with tortious actions in violation of various criminal laws of the United States. Count V charges defendants with conspiracy to commit the torts specified in Counts I through IV.

The district court dismissed Count IV on the ground that none of the federal statutes relied on by plaintiffs, 18 U.S.C. §§ 371, 956-957, 960, 1651-1652, 1654, 1661 (1976), provides a private right of action for damages. 517 F. Supp. at 545. Appellants have not appealed this ruling. Counts I and V provide no independent basis for federal jurisdiction under the two statutes alleged to vest the district court with jurisdiction. 28 U.S.C. §§ 1331, 1350 (1976 & Supp. V 1981).

with foreign and international relations." 517 F. Supp. at 548. Section 1350 jurisdiction is lacking, the district court held, for the same reason: International human rights law grants no private right of action, and section 1350, like section 1331, must be interpreted narrowly to require such a right in suits for violation of international law. 517 F. Supp. at 549-50.

In this appeal, appellants agree with the district court that, for purposes of the issues raised in this case, the jurisdictional requirements of sections 1331 and 1350 are the same. *See* Brief for Appellants at 35-36; 517 F. Supp. at 549 n.2 ("[P]laintiffs themselves recognize that the jurisdictional bases of § 1331 and § 1350 are identical as to the role of the law of nations."). Contrary to the holding of the district court, however, they contend that at least some of the treaties they cite in their complaint impliedly provide private rights of action for the claims in Count III and that federal common law provides private rights of action for the claims in Count II. Thus, appellants argue, section 1350 gives jurisdiction over the claims of the alien plaintiffs and section 1331 gives jurisdiction over the claims of all the plaintiffs, including those who are United States citizens.[6]

For the reasons given below, appellants' contentions must be rejected. I first consider separation of powers principles that counsel courts, in a case like this, not to infer any cause of action not expressly granted. I then show that the treaties on which appellants rely create no private causes of action. Turning next to appellants' claim under general principles of international law, I conclude that federal common law does not automatically accord appellants a cause of action and that appellants have not been granted a cause of action by federal statute or by international law itself. Finally, in order to

---

[6] The Tel-Oren plaintiffs are citizens of the United States, and the Drory plaintiffs are citizens of the Netherlands. The other plaintiffs are citizens of Israel. All the plaintiffs reside in Israel.

clarify what I believe we should and should not have decided, I discuss the recent decision of the Second Circuit in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a case having some similarities to this one.

II.

The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. It will be seen below, however, that no body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.

The Supreme Court explained in *Davis* v. *Passman*, 442 U.S. 228 (1979), that to ask whether a particular plaintiff has a cause of action is to ask whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240 n.18. The Court said that the "question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241 (emphasis in original). In addressing the question, as the *Davis* opinion itself makes clear, the focus may be at least as much on the character of the issues presented for decision as on the character of the class of litigants

seeking an adjudication, and the result of the inquiry might well be that certain claims cannot be litigated at all in certain forums.

This case presents a question not covered by the analyses described by the *Davis* court for statutory and constitutional causes of action. An analysis of the appropriateness of providing appellants with a cause of action must take into account the concerns that are inherent in and peculiar to the field of international relations. My assessment of those concerns leads me to a conclusion different from that reached in *Davis*, for here there appear to be "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). The factors counselling hesitation are constitutional; they derive from principles of separation of powers.

The crucial element of the doctrine of separation of powers in this case is the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). That principle has been translated into a limitation on judicial power in the international law area principally through the act of state and political question doctrines. Whether or not this case falls within one of these categories, the concerns that underlie them are present and demand recognition here.

"The act of state doctrine in its traditional formulation precludes the courts from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). Originally, the doctrine rested primarily on notions of sovereignty and comity. *See Underhill* v. *Hernandez*, 168

U.S. 250, 252 (1897). In more recent formulations, there has been "a shift in focus from the notions of sovereignty and the dignity of independent nations . . . to concerns for preserving the 'basic relationships between branches of government in a system of separation of powers,' and not hindering the executive's conduct of foreign policy by judicial review or oversight of foreign acts." *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979) (quoting *Sabbatino*, 376 U.S. at 423).

The *Sabbatino* Court explained that, although the Constitution does not compel the act of state doctrine, the doctrine has "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." 376 U.S. at 423. The Court emphasized the separation of powers basis for the doctrine when it observed that the doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 427-28. In its principal post-*Sabbatino* act of state case, the Supreme Court again stressed the centrality of separation of powers concerns: "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 697 (1976).[7]

---

[7] The Supreme Court also discussed the act of state doctrine in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), but the case produced no majority opinion. Nonetheless, all of the Justices except Justice Douglas, who scarcely addressed the act of state doctrine, stated that judicial abstention

The courts of appeals have likewise emphasized the decisive role played, in applying the doctrine, by the two relevant aspects of separation of powers: the potential for interference with the political branches' functions and the fitness of an issue for judicial resolution. *See, e.g., International Association of Machinists & Aerospace Workers* v. *OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d at 1292-93; *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 77-79 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Timberlane*

---

from pronouncing judgment on the validity of a foreign act of state turns on separation of powers concerns.

Four Justices said that application of the act of state doctrine depends chiefly on the potential for interference with, or usurpation of, the political branches' primary role in foreign affairs. Justice Rehnquist, joined by Chief Justice Burger and Justice White, stated: "The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." 406 U.S. at 765 (Opinion of Rehnquist, J.). He also stated: "The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *Id.* at 767-68. Justice Powell, writing separately, echoed these views. The act of state doctrine, he said, bars adjudication when and only when "it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches." *Id.* at 775-76 (Powell, J., concurring in the judgment).

Justice Brennan, joined by Justices Stewart, Marshall, and Blackmun, disagreed with the view that the act of state doctrine was exclusively concerned with interference with other branches' conduct of foreign relations. Rather, he wrote, the act of state doctrine is one part of the political question doctrine and therefore depends for its application on a variety of considerations, no one of which—not even the Executive's declaration that adjudication will not interfere with foreign relations—can be conclusive on the ultimate determination whether an issue is fit for judicial resolution. 406 U.S. at 785-93 (Brennan, J., dissenting).

Lumber Co. v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-08 (9th Cir. 1976).

The same separation of powers principles are reflected in the political question doctrine. The Supreme Court gave that doctrine its modern formulation in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied. *See id.* at 211-14. If it were necessary, I might well hold that the political question doctrine bars this lawsuit, since it is arguable, as much of the remainder of this opinion will show, that this case fits several of the categories listed in *Baker* v. *Carr*. Such a determination is not necessary, however, because many of the same considerations that govern application of the political question doctrine also govern the question of the appropriateness of providing appellants with a cause of action.[8]

---

[8] A plaintiff who has no cause of action is, according to *Davis* v. *Passman*, 442 U.S. at 240 n.18, not entitled to "invoke the power

Neither is there a need to consider whether the act of state doctrine applies to bar this case from going forward. Although the act of state doctrine might well apply to Libya's alleged role in the 1978 bus attack, it would seem not to apply, in its current formulation, to the alleged acts of the PLO, the PIO, and the NAAA, none of which would seem to be a state under international law. *See* Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Un-*

---

of the court." He is not entitled to a pronouncement on the legal merits of his claim. In that respect he is more like a plaintiff who lacks standing than he is like a plaintiff facing a motion to dismiss for failure to state a claim. That is especially true in a case like this, where judicial consideration of the legal merits is of constitutional concern, so that parties should not be able to waive the claim that no cause of action exists. In these circumstances, whether a cause of action exists is a threshold issue that involves a question of the limits of judicial powers.

I do not conceive that, in a case like this, the political question doctrine must be considered first because it is jurisdictional. The jurisdictional aspect of that doctrine extends no further than its rationale: to prevent courts from reaching the merits of issues that, for a variety of reasons, are not theirs to decide. *Baker* v. *Carr*, 369 U.S. at 217. By deciding that there is no private cause of action here we do not reach substantive issues that are best decided by the political branches. It may be, moreover, that while the existence of a cause of action is not a jurisdictional issue in the ordinary case, it is, or is closely akin, to a jurisdictional issue when its decision implicates, as here, considerations linked to the proper exercise of the judicial power granted by Article III of the Constitution. It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court, *see Goldwater* v. *Carter*, 444 U.S. 996 (1979), and among scholars, *see, e.g.*, Henkin, *Is There A "Political Question" Doctrine?*, 85 Yale L.J. 597, 622-23 (1976). Given this situation, I would rather not decide whether a political question is involved in a case where that issue has not been briefed and argued. By contrast, the grounds upon which I do decide were thoroughly explored through vigorous adversarial presentations.

der International Law, 9 Den. J. Int'l L. & Pol'y 1, 2-3 (1980).[9] Nevertheless, to the extent the act of state doctrine is based predominantly, if not exclusively, on separation of powers concerns (as it has increasingly come to be), its own rationale might justify extending it to cover the acts of such entities as the PLO where adjudication of the validity of those acts would present problems of judicial competence and of judicial interference with foreign relations. Such an extension would bring the act of state doctrine closer, especially in its flexibility, to the political question doctrine. *Cf. First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 785-93 (1972) (Brennan, J., dissenting) (act of state doctrine as elaborated in *Sabbatino* equivalent to political question doctrine). Whether the two doctrines should be merged and how, if merged, they would apply to the allegations of appellants' complaint are issues beyond the scope of our inquiry. Instead, those doctrines are drawn upon for what they say about the separation of powers principles that must inform a determination of the appropriateness of appellants' litigating their claims in federal court.

Those principles counsel against recognition of a cause of action for appellants if adjudication of their claims would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations. Appellants' complaint requires a determination, either at the jurisdictional stage or at the stage of defin-

---

[9] "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states." Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. *See also Restatement (Second) of the Foreign Relations Law of the United States* § 4 (1965). Furthermore, the act of state doctrine would still not apply, even if the PLO is said to have been the agent of Libya, since the attack did not take place "within [Libya's] own territory." *Sabbatino*, 376 U.S. at 401.

ing and applying a rule of decision, whether international law has been violated.[10] I am therefore guided in large measure by the Supreme Court's observation in *Sabbatino* that

> the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

376 U.S. at 428. There is no need to decide here under what circumstances considerations such as these might deprive an individual of a cause of action clearly given by a state, by Congress, by a treaty, or by international

---

[10] If jurisdiction rested on section 1331, at least one necessary rule of decision would have to be supplied by international law, the federal law under which the case arose. *See Francise Tax Board* v. *Construction Laborers Vacation Trust for Southern California*, 103 S. Ct. 2841, 2846-48 (1983). If jurisdiction rested on section 1350, there are three arguable theories about what law would supply the rule of decision. The rule of decision might be the international law (treaty or customary international law) violated; it might be a federal common law of torts; or it might be the tort law of whatever jurisdiction applicable choice of law principles would point to. *Cf.* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 99-100 (1981). Under the latter two constructions, of course, whether international law was violated would have to be decided as a jurisdictional prerequisite.

law.[11] In the absence of such a cause of action, they lead to the conclusion that adjudication of appellants' claims would present grave separation of powers problems. It is therefore inappropriate to recognize a cause of action allowing appellants to bring this suit.[12]

Most important, perhaps, even appellants concede that the incidents described in appellants' complaint are properly understood only when viewed in the context of the continuing conflicts in the Middle East. Indeed, appellants point out that "[o]ne of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotiations by destroying the positive efforts made in the Camp David accords." Brief for Appellants at 15. The Camp David Accords, of course, were but one of the major efforts made by the United States to resolve the myriad problems behind the series of military and political conflicts that have kept the Middle East at or near the center of American foreign relations for at least the last fifteen years. A judicial pronouncement on the PLO's responsibility for the 1978 bus attack would likely interfere with American diplomacy, which is as actively concerned with the Middle East today as it has ever been.[13]

---

[11] A state-court suit that involved a determination of international law would require consideration of much that I discuss here as well as the principle that foreign relations are constitutionally relegated to the federal government and not the states. *See* Zschernig v. Miller, 389 U.S. 429 (1968).

[12] The existence of severe separation of powers problems in adjudicating appellants' claims reinforces my conclusion, *see infra* pp. 90-96, that international law affords appellants no cause of action. The potential for interference with governments conducting their foreign relations is central both to separation of powers limits on jurisdiction and to international law's general refusal to grant private rights of action. The existence of such a potential in any case must count strongly against international law's providing a private right of action for that case.

[13] Libya must be dismissed from the case because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976),

The potential for interference with foreign relations is not diminished by the PLO's apparent lack of international law status as a state. Nor does it matter whether the Executive Branch officially recognizes, or has direct dealings with, the PLO. The fact remains that the PLO bears significantly upon the foreign relations of the United States. If any indication of that role is needed, it is provided by the official "observer" status that the PLO has been accorded at the United Nations, G.A. Res. 3237, 29 U.N. GAOR Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974), as well as by the diplomatic relations that the PLO is reported to have with some one hundred countries around the world, *see* Kassim, *supra*, 9 Den. J. Int'l L. & Pol'y at 19; Friedlander, *The PLO and the Rule of Law: A Reply to Dr. Anis Kassim*, 10 Den. J. Int'l L. & Pol'y 221, 232 (1981).

The nature of appellants' international law claims provides a further reason for reluctance to recognize a cause of action for appellants. Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching "sharply on national nerves." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 428. The *Sabbatino* Court warned against adjudication of such international law issues. *Id.* Because I

---

plainly deprives us of jurisdiction over Libya. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 103 S. Ct. 1962 (1983) (court must decide immunity question, which is jurisdictional). Because the alleged actions of the PIO and the NAAA all involve giving assistance to the PLO's alleged actions, an adjudication of the claims against them would require adjudication of the claims against the PLO. If, as I conclude, the latter presents sufficiently serious problems that no cause of action can be inferred, so too must the former. I therefore concern myself only with the PLO. Of course, adjudication of the complaint against Libya would present many of the same separation of powers problems as would adjudication of the complaint against the other defendants.

believe that judicial pronouncements on the merits of this case should be avoided, I mention only briefly some of the difficulties raised by some of the claims in appellants' complaint.

Appellants would have to argue, if their case were adjudicated, for an exception to the general rule that international law imposes duties only on states and on their agents or officials. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law*, 246-47 (1980); *Restatement of the Foreign Relations Law of the United States (Revised)* § 101, at 21 (Tent. Draft No. 1, 1980) (" 'International law' . . . deals with the conduct of states and of international organizations, and with their relations inter se, as well as some of their relations with persons, whether natural or juridical."); *id.* §§ 701-722, at 137-257 (Tent. Draft No. 3, 1982) (stating international law protections of persons solely in terms of state obligations). If, as would appear, the PLO is not a state, a finding that it should nonetheless be held to the duties imposed by the customary rules of international law governing the conduct of belligerent nations, *e.g.*, Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Protocols I and II of the Geneva Convention of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, *reprinted in* 16 I.L.M. 1391, 1443 (1977), would not entail merely the application of an agreed principle to new facts. Rather, a finding that because of its governmental aspirations and because of the role it has played in the Middle East conflicts the PLO should be subject to such rules would establish a new principle of international law. Likewise, to interpret various human rights documents as imposing legal duties on nonstates like the PLO would require both entering a new and

unsettled area of international law and finding there an exception to international law's general rule.[14]

Another difficulty presented by appellants' complaint is that some of the documents on which they rely as statements of customary principles of international law expressly make the purposes of an action relevant to its unlawfulness. For example, appellants allege that appellees violated the proscription, in article 51 of the Protocol I of the Geneva Conventions of 12 August 1949, on "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population." They also allege that appellees violated the proscription on genocide, defined in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, to mean acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group. Adjudication of these claims would require inquiry into the PLO's intention in planning the 1978 bus attack (assuming the PLO's involvement) and into the organizational goals of the PLO. The dangers of such inquiry into the intentions of the PLO are similar to those attending an inquiry into the intentions of a state. *See Hunt* v. *Mobil Oil Corp.*, 550 F.2d at 77 (act of state doctrine bars inquiry into Libya's motivation for actions: "Inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention. . . .").

---

[14] One aspect of this problem is the apparent assumption of state action in the definition of certain international legal principles. Thus, the United Nations General Assembly has defined torture as "any act by which severe pain or suffering is intentionally inflicted by or at the instigation of a public official." G.A. Res. 3452, art. 1, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). This assumption of state action is one reason why it is by no means utterly obvious that the torture alleged in appellants' complaint would be prohibited by international law.

In addition, appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East. Some aspects of terrorism have been the subject of several international conventions, such as those concerning hijacking, *e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention on the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, and attacks on internationally protected persons such as diplomats, *e.g.*, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532. But no consensus has developed on how properly to define "terrorism" generally. G. von Glahn, *Law Among Nations* 303 (4th ed. 1981). As a consequence, "'[i]nternational law and the rules of warfare as they now exist are inadequate to cope with this new mode of conflict.'" *Transnational Terrorism: Conventions and Commentary* xv (R. Lillich ed. 1982) (quoting Jenkins, International Terrorism: A New Mode of Conflict 16 (California Seminar on Arms Control and Foreign Policy, Research Paper No. 48, 1975)). "The dismal truth is that the international community has dealt with terrorism ambivalently and ineffectually." Shestack, *Of Private and State Terror—Some Preliminary Observations*, 13 Rutgers L.J. 453, 463 (1982).

Customary international law may well forbid states from aiding terrorist attacks on neighboring states. *See* Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am. U.L. Rev. 217, 251-76 (1977). Although that principle might apply in a case like this to a state such as Libya (which is not a proper party here, *see supra* note 13), it does not, at least on its face, apply to a nonstate like the PLO. More important, there is less than universal consensus about whether PLO-sponsored attacks on Israel are lawful. One important sign of the lack of consensus about terrorism generally, and about PLO activities in particular, is that accusations of terrorism are often met not by denial of the fact of responsibility but by a justification for the challenged actions. *See* Blum & Steinhardt, *supra* note 10, 22 Harv. Int'l L.J. at 92. Indeed, one of the key documents relied on as evidence of an international law proscription on terrorism, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), was said by at least one state at the time of its promulgation not to be applicable to Palestinian terrorist raids into Israel supported by Arab states. 24 U.N. GAOR 297, U.N. Doc. A/C.6/SR. 1160 (1969) (remarks of Mr. El Attrash of Syria), discussed in Lillich & Paxman, *supra*, 26 Am. U.L. Rev. at 272 (qualification is significant). Attempts to secure greater consensus on terrorism have foundered on just such issues as the lawfulness of violent action by groups like the PLO fighting what some states view as "wars of national liberation." [15] *See* Franck

---

[15] It is worth noting that even the 1972 United States Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, 67 Dep't St. Bull. 431 (1972), would present some problems to appellants. First, it makes motive a key to violation. Second, like the European Convention on the Suppression of Terrorism, Jan. 27, 1977, 15 I.L.M. 1272 (1976), the

& Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 Am. J. Int'l L. 69 (1974); Paust, *"Nonprotected" Persons or Things*, in *Legal Aspects of International Terrorism* 341, 355-56 (A. Evans & J. Murphy eds. 1978); *cf.* Verwey, *The International Hostages Convention and National Liberation Movements*, 75 Am. J. Int'l L. 69 (1981) (obligations of national liberation movements were major problem in drafting and promulgating International Convention against the Taking of Hostages).

There is, of course, no occasion here to state what international law should be. Nor is there a need to consider whether an extended and discriminating analysis might plausibly maintain that customary international law prohibits the actions alleged in the complaint. It is enough to observe that there is sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles that litigation of appellants' claims would present, in acute form, many of the problems that the separation of powers principles inherent in the act of state and political question doctrines caution courts to avoid. The lack of clarity in, and absence of consensus about, the legal principles invoked by appellants, together with the political context of the challenged actions and the PLO's impingement upon American foreign relations, lead to the conclusion that appellants' case is not the sort that is appropriate for federal-court adjudication, at least not without an express grant of a cause of action.

I turn next to examine treaties, common law, congressional enactments, and customary international law to determine whether any of these sources of law provides a

---

1972 Draft Convention relies on criminal remedies for the vindication of the rights specified, thus leaving the power to invoke remedies in the hands of states. Third, the 1972 Draft Convention does not protect citizens of a state against attack within the state.

cause of action for appellants. In light of what has been said, it would require a very clear showing that these other bodies of law grant appellants a cause of action before my concerns about the principles of separation of powers could be overcome. But, as will be seen, there is no clear grant of a cause of action to be found. In truth, the law concerning treaties and customary international law of its own force appears actually to deny appellants any cause of action.

III.

Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts. *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds*, *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1883); *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action. *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Z & F Assets Realization Corp* v. *Hull*, 114 F.2d 464, 470-71 (D.C. Cir. 1940), *aff'd on other grounds*, 311 U.S. 470, 489 (1941); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d at 1298. When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action. *See Diggs* v. *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

In Count III of the complaint, appellants alleged that defendants violated the following "treaties of the United States":

> —Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287;

—Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993;

—Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Conventions);

—Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135;

—Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Organization of American States (OAS) Convention);

—Protocols I and II to the Geneva Conventions of 12 August 1949, June 7, 1977, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *reprinted in* 16 I.L.M. 1391, 1442 (1977);

—Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970);

—Universal Declaration of Human Rights, G.A. Res. 217, U.N. 3 GAOR, U.N. Doc. 1/777 (1948);

—International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

—Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A. Res. 2675, 25

U.N. GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970);

— Convention on the Prevention and Punishment of the Crime and [sic] Genocide, Dec. 9, 1948, 78 U.N.T.S. 277;

— Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); and

— American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970), 65 Am. J. Int'l L. 679 (1971).

Only the first five of these alleged treaties are treaties currently binding on the United States. *See* Treaties Affairs Staff, Office of the Legal Adviser, Department of State, *Treaties in Force* (1983). Even if the remaining eight are relevant to Count II of the complaint as evidence of principles of international law, they are not treaties of the United States. Since Count III (tortious actions in violation of the treaties of the United States) purports to state a cause of action distinct from that stated in Count II (tortious actions in violation of the law of nations), the last eight of the thirteen alleged treaties of the United States can provide no basis for jurisdiction over the claims in Count III under the treaty components of sections 1331 and 1350.

Of the five treaties in force, none provides a private right of action. Three of them—the Geneva Convention for the Protection of Civilian Persons in Time of War, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish Acts of Terrorism—expressly call for implementing legislation. A treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.)

at 311-14; *United States* v. *Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). These three treaties are therefore not self-executing. Indeed, with respect to the first Geneva Convention, one court has already so held. *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

Articles 1 and 2 of the United Nations Charter are likewise not self-executing. They do not speak in terms of individual rights but impose obligations on nations and on the United Nations itself. They address states, calling on them to fulfill in good faith their obligations as members of the United Nations. Sanctions under article 41, the penultimate bulwark of the Charter, are to be taken by states against other states. Articles 1 and 2, moreover, contain general "purposes and principles," some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals.[16] These considerations compel the conclusion that articles 1 and 2 of the U.N. Charter were not intended to give individuals the right to enforce them in municipal courts, particularly since appellants have provided no evidence of a contrary intent. *See Pauling* v. *McElroy*, 164 F.Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960); *Dreyfus* v. *Von Finck*, 534 F.2d at 30; *People of Saipan* v. *Department of Interior*, 502 F.2d 90, 100-03 (9th Cir. 1974) (Trask, J., concurring), *cert. denied*, 420 U.S. 1003 (1975); *Sei Fujii* v. *State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

The Hague Conventions similarly cannot be construed to afford individuals the right to judicial enforcement.

---

[16] For example, private enforcement of what is perhaps the fundamental principle of the Charter—the nonaggression principle of article 2, section 4—would flood courts throughout the world with the claims of victims of alleged aggression (claims that would be extremely common) and would seriously interfere with normal diplomacy.

Although the Conventions contain no language calling for implementing legislation, they have never been regarded as law private parties could enforce. If they were so regarded, the code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Conventions violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation or the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. It is for these reasons that the Conventions are best regarded as addressed to the interests and honor of belligerent nations, not as raising the threat of judicially awarded damages at war's end. The Hague Conventions are not self-executing. The Second Circuit has drawn the same conclusion, *Dreyfus* v. *Von Finck*, 534 F.2d at 30, and appellants have pointed to no case holding otherwise in the more than three-quarters of a century since the Conventions were adopted.

None of the five treaties relied on by appellants thus even impliedly grants individuals the right to seek damages for violation of their provisions. Appellants have, therefore, failed to state a cause of action for violation of any treaties of the United States. Count III of their complaint, consequently, does not come within the arising-under jurisdiction of section 1331. Nor does it come within section 1350, because this provision, like section 1331, is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions. *See Dreyfus* v. *Von Finck*, 534 F.2d at 28 (affirming dis-

missal for lack of cause of action under treaties in suit by alien where jurisdiction expressly based on sections 1331 and 1350).[17]

IV.

Appellants' argument that they may recover damages for violations of international law is simple. International law, they point out, is part of the common law of the United States. This proposition is unexceptionable. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820). But appellants then contend that federal common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights. I cannot accept this conclusion.[18]

Appellants' argument reflects a confusion of two distinct meanings of "common law". That term has long referred to the body of court-made law whose origins can be traced to the medieval English legal system. It has also come to refer generally to law (mostly court-made) not based on a statute or constitution. "Federal

---

[17] Because none of the treaties cited by appellants provides them a cause of action, it is unnecessary to decide whether any of the treaties imposes duties on parties such as appellees here. Thus, in particular, there is no need to inquire into the contacts with the United States of appellees and their actions. That inquiry is also unnecessary for a decision on Count II of appellants' complaint, as I conclude that appellants have no cause of action for that count on grounds independent of the closeness of appellees' United States contacts.

[18] The district court rejected it on the general ground that "an action predicated on . . . norms of international law must have at its basis a specific right to a private claim" found in international law itself. 517 F. Supp. at 549. That formulation is very likely too strong, as it would seem to deny Congress the power to provide individuals a statutory right of action to seek damages for international law violations not actionable under international law itself.

common law", in particular, has been used "to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973) (*"Hart & Wechsler"*). To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts. It is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief.

Thus, the step appellants would have us take—from the phrase "common law" to the implication of a cause of action—is not a simple and automatic one. Neither is it advisable. The considerations of separation of powers rehearsed above provide ample reason for refusing to take a step that would plunge federal courts into the foreign affairs of the United States.

Appellants, seeking to recover for a violation of international law, might look to federal statutes either for a grant of a cause of action or for evidence that a cause of action exists. These notions may be quickly dismissed. The only plausible candidates are the two jurisdictional statutes relied on by appellants, sections 1331 and 1350 of Title 28 of the United States Code. Neither of those statutes either expressly or impliedly grants a cause of action. Both statutes merely define a class of cases federal courts can hear; they do not themselves even by implication authorize individuals to bring such cases. As the Supreme Court has stated, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249

(1951). *See also Dreyfus* v. *Von Finck*, 534 F.2d at 28 (neither 1331 nor 1350 grants a cause of action).

Although the jurisdictional statutes relied on by appellants cannot be read to provide a cause of action, those statutes might conceivably provide evidence of Congress' recognition (as opposed to creation) of one. Appellants do not suggest that section 1331 is evidence of any such recognition, as nothing in its language or history could support such a reading. Rather, appellants focus on section 1350, which is concerned expressly and only with international law (treaties and customary international law) and therefore might suggest that Congress understood, when providing jurisdiction through section 1350, that some individuals would be able to take advantage of that jurisdiction because they had causes of action for torts committed in violation of the law of nations.[19]

The broadest reading of section 1350 as evidence of congressional recognition of such a cause of action is that it merely requires that a plaintiff prove that the actions complained of violated international law. If that jurisdictional prerequisite is met, according to appellants, the plaintiff has a cause of action for tort damages, as he would for any tort. This approach is adopted by the Second Circuit in *Filartiga*, as well as by Judge Edwards. I believe, nonetheless, that this construction of section 1350 must be rejected for several reasons.

First, appellants' broad reading would have to apply equally to actions brought to recover damages for torts

---

[19] Appellants argue that a citizen's access to federal courts to seek damages for a tort committed in violation of international law should be the same as an alien's access. International law's special concern for aliens might suggest to the contrary, *see* L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 685-803, 805, and the restriction of section 1350 to aliens might reflect that concern. This question need not be pursued, however, since, for reasons having nothing to do with appellants' citizenship, they have no cause of action in this case.

committed in violation of treaties, since treaties stand in exactly the same position in section 1350 as principles of customary international law (the law of nations). Such an application would render meaningless, for alien plaintiffs, the well-established rule that treaties that provide no cause of action cannot be sued on without (express or implied) federal law authorization. *See supra* p. 21.

Judge Edwards' approach, as well as the analysis of the Second Circuit in *Filartiga*, would also make all United States treaties effectively self-executing. As appellants here seek evidence of a cause of action to vindicate an asserted international law right that they do not assert itself affords them a private right of action, their claim is indistinguishable, under the language of section 1350, from a claim brought to vindicate rights set forth in a non-self-executing treaty.

In addition, appellants' construction of section 1350 is too sweeping. It would authorize tort suits for the vindication of any international legal right. As demonstrated below, that result would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself, and would run counter to constitutional limits on the role of federal courts. Those reasons demand rejection of appellants' construction of section 1350 unless a narrow reading of the provision is incompatible with congressional intent. There is no evidence, however, that Congress intended the result appellants suggest.

What is known of the origins of section 1350 was perhaps best described by Judge Friendly in *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975): "This old but little used section is a kind of legal Lohengrin; . . . no one seems to know whence it came." Section 1350 was enacted, in almost its current form, as part of the Judici-

ary Act of 1789, ch. 20, 1 Stat. 73, 77.[20] I have discovered no direct evidence of what Congress had in mind when enacting the provision. The debates over the Judiciary Act in the House—the Senate debates were not recorded —nowhere mention the provision, not even, so far as we are aware, indirectly. *See* 1 Annals of Cong. 782-833 (J. Gales ed. 1789).

Historical research has not as yet disclosed what section 1350 was intended to accomplish. The fact poses a special problem for courts. A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection. It will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules. It will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs.

What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. *The Federalist* No. 80 (A. Hamilton). A broad reading of section 1350 runs directly contrary to that desire. It is also relevant to a

---

[20] Section 1350, the Alien Tort Claims Act, was enacted by the First Congress in section 9 of the Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 76-77. The original statute read: "[T]he district courts . . . shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."

construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this one or like *Filartiga.*[21] As Justice Frankfurter said in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959):

> The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred.

In the case of section 1350, the period before the expansion was proposed is more than twice eighty-three years.

Though it is not necessary to the decision of this case, it may be well to suggest what section 1350 may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning. The phrase "law of nations" has meant various things over time. It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. *See, e.g.*,

---

[21] In nearly two hundred years, jurisdiction has been predicated successfully under section 1350 only three times. *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (jurisdiction over allegation of official torture not ratified by official's state); *Adra* v. *Clift*, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated law of nations); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty with France superseded law of nations; 1350 alternative basis of jurisdiction).

Hassan, *International Human Rights and the Alien Tort Statute: Past and Future*, in *Human Rights Symposium: Further Commentary*, 5 Hous. J. Int'l L. 131, 139 (1982); Oliver, *A Brief Replication: The Big Picture and Mr. Schneebaum's Reply*, in *Human Rights Symposium: Further Commentary*, 5 Hous. J. Int'l L. 151, 153 (1982); 1 L. Oppenheim, *International Law* § 292 (2d ed. 1912), *quoted in* Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 Hous. J. Int'l L. 13, 26-27 (1981). *See also* Hassan, *supra*, 4 Hous. J. Int'l L. at 19-20. Clearly, cases like this and *Filartiga* were beyond the framers' contemplation. *Id.* at 24-26. That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not. A different question might be presented if section 1350 had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments. But section 1350 does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.

What kinds of alien tort actions, then, might the Congress of 1789 have meant to bring into federal courts? According to Blackstone, a writer certainly familiar to colonial lawyers, "the principal offences against the law of nations, animadverted on as such by the municipal laws of England, [were] of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassa-

dors; and 3. Piracy." 4 W. Blackstone, *Commentaries* 68, 72, *quoted in* 1 W.W. Crosskey, *Politics and Constitution in the History of the United States* 459 (1953) ("Crosskey"). One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations.[22]

The Constitution, of course, gave particular attention to piracy and to the rights of ambassadors. Article I, section 8, links piracy and the law of nations by granting Congress power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." And Article III, section 2, gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other Public Ministers and Consuls." Section 9 of the Judiciary Act of 1789 (now section 1350) gave jurisdiction to district courts, concurrent with

---

[22] That Blackstone refers to these three classes of offenses as not only violations of the law of nations, but censured as such by the municipal law of England does not require the conclusion that in America these three types of violations did not carry with them a private cause of action for which section 1350 gave the necessary jurisdiction to federal courts. The former colonies picked up the law of England as their own. As stated in the Preface to the American Edition of Blackstone: "The *common law* is as much the birth-right of an American as of an Englishman. It is our law, as well as the law of England, it having been brought thence, and established here as far forth as it was found fitted to our institutions and the circumstances of the country." W. Blackstone, *Commentaries* vii (1854) (emphasis in original). English statutes, which were, of course, part of the municipal law, were also adopted as part of American common law, to the extent that their "collective and equitable principles had become so interwoven with the common law, as to be scarcely distinguishable therefrom." Fitch v. Brainerd, 2 Conn. 163 (1805), *quoted in* Jones, *The Reception of the Common Law in the United States in* H. Jones, J. Kernochan, & A. Murphy, *Legal Method: Cases and Text Materials* (1980). And at least some offenses against the law of nations, such as violations of safe-conducts, resulted not only in criminal punishment but in restitution for the alien out of the offender's effects. W. Blackstone, *Commentaries* 69.

that of state courts and circuit courts, over tort suits by aliens for violations of the law of nations. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. This may well have envisaged a tort like piracy (a citizen could use diversity jurisdiction).[23]

---

[23] The crime of piracy was often defined as piracy *jure gentium* —piracy by the law of nations, as distinguished from piracy by municipal law. *E.g.*, 2 J. Moore, *A Digest of International Law* § 311, at 951-52 (1906); Dickinson, *Is the Crime of Pir ~y Obsolete?*, 38 Harv. L. Rev. 334, 335-36 (1925) (*"The Crime of Piracy"*). The crime of piracy was thought to be sufficiently defined by the law of nations. *The Federalist* No. 42 (J. Madison) ("The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite."). Although the Congress, in defining piracy in the Federal Crimes Act of 1790 confused the concepts of piracy defined by the law of nations and piracy defined by municipal law, Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14; *see The Crime of Piracy* at 342-49, Congress later changed the definition in reaction to the very first Supreme Court case construing section 8, *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818). The new statute punished "the crime of piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14. *See The Crime of Piracy* at 342-49. Thus, Justice Story, in *United States* v. *Smith*, 18 U.S. (5 Wheat) 71, 75 (1820), wrote that "whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find, that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea." Furthermore, in a celebrated footnote of more than eight and one-half pages, Justice Story showed that "piracy is defined by the law of nations." *Id.* at 75-84.

Opening federal courts to tort suits based on piracy would not, apparently, have involved courts in foreign relations since piracy was, as stated in *United States* v. *Smith*, merely robbery on the high seas. It could not be committed by nations, or by anyone acting for reasons other than for plunder. According to Hackworth, "when the acts in question are committed from purely political motive, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime." G. Hackworth, *Digest of International Law* § 203, at 681 (1941).

The idea that section 9 of the original Judiciary Act, now section 1350, was concerned with the rights of ambassadors (and other foreign representatives) is suggested by another provision of the statutes. Section 13 gave the Supreme Court such original and exclusive jurisdiction over all suits *against* ambassadors "as a court of law can have or exercise consistently with the law of nations" (emphasis added). Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. That section, however, gave the Court original but not exclusive jurisdiction of "all suits brought *by* ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party" (emphasis added). This appears to tie in to the grant of tort jurisdiction for suits by aliens in what is now section 1350. (Section 1350's use of the broader term "aliens" may merely indicate that the torts of piracy and violations of safe-conduct, which would involve plaintiffs other than ambassadors, were included.)

An intent to protect the rights of ambassadors is also plausible historically. According to Crosskey, the Convention, in assigning to Congress the power to "define and punish . . . Offences against the Law of Nations" had in mind, aside from piracy, the rights of ambassadors. Crosskey at 459. He draws this conclusion from the notoriety of a case discussed by both Lord Mansfield, of the Court of King's Bench, and by Blackstone. An ambassador of the Czar had been arrested by his English creditors, and, was, in the process "somewhat roughed up before the arrest was accomplished." *Id.* He demanded of the Queen that his assailants be subjected to "severe 'corporal Punishment.'" *Id.* at 460. English law at the time, however, did not permit punishment severe enough to satisfy the offended ambassador, who protested to Czar Peter. The Czar demanded that the offenders be put to death. As a result, the law was changed, giving the Chief Justice of Queen's Bench, among other members of the "executive" branch, the power to try any offenses

against ambassadors, and the Czar was placated. *Id.* at 461-62. This "slightly ridiculous affair," according to Crosskey, was well-known because of repeated comment upon it. *Id.* at 462. If this was indeed the incident the Convention considered in allocating to Congress the power to "define and punish . . . Offences against the Law of Nations," it may be that the First Congress, sensitive to the international ramifications of denying ambassadors redress, enacted section 1350 to give ambassadors the option of bringing tort actions in federal courts as well as in state courts.

These thoughts as to the possible original intention underlying section 1350 are admittedly speculative, and those who enacted the law may well have had additional torts in mind. I offer these possibilities merely to show that the statute could have served a useful purpose even if the larger tasks assigned it by *Filartiga* and Judge Edwards are rejected. Moreover, if the offenses against the law of nations listed by Blackstone constituted the torts the framers of section 1350 had in mind, then the creation of federal jurisdiction for the redress of aliens' grievances would tend to ease rather than inflame relations with foreign nations. That result comports with Hamilton's expressed desire. Whether evidence so slim as to the intended office of the statute provides materials from which courts today may properly make substantive law is a jurisprudential issue with which, given the grounds upon which I would place our decision, I need not grapple today. But when courts go beyond the area in which there is any historical evidence, when they create the substantive rules for topics such as that taken up in *Filartiga* or in Judge Edwards' formulations, then law is made with no legislative guidance whatever. When that is so, it will not do to insist that the judge's duty is to construe the statute in order not to flout the will of Congress. On these topics, we have, at the moment, no evidence what the intention of Congress was. When courts

lack such evidence, to "construe" is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then be only accidental. Section 1350 can probably be adequately understood only in the context of the premises and assumptions of a legal culture that no longer exists. Perhaps historical research that is beyond the capacities of appellate judges will lift the darkness that now envelops this topic, but that has not yet occurred, and we should not attempt to anticipate what may or may not become visible.

Congress' understanding of the "law of nations" in 1789 is relevant to a consideration of whether Congress, by enacting section 1350, intended to open the federal courts to the vindication of the violation of any right recognized by international law. Examining the meaning of the "law of nations" at the time does not, contrary to my colleague's charges, "avoid the dictates of *the Paquete Habana*" and "limit the 'law of nations' to its 18th Century definition." Edwards' op. at 32. The substantive rules of international law may evolve and perhaps courts may apply those new rules, but that does not solve the problem of the existence of a cause of action. If plaintiffs were explicitly provided with a cause of action by the law of nations, as it is currently understood, this court might—subject to considerations of justiciability—be required by section 1350 to entertain their claims. But, as discussed below, *see infra* pp. 90-96, international law today does not provide plaintiffs with a cause of action.[24]

---

[24] Nor is there any significance to the fact that in *The Paquete Habana* the court assumed a private cause of action to exist. That case involved a branch of the law of nations—prize jurisdiction under maritime law—which had long recognized the right of private enforcement. That, as will be shown, is not universally true of international law and most particularly is not true of the area in which this case falls.

Recognition of suits presenting serious problems of interference with foreign relations would conflict with the primary purpose of the adoption of the law of nations by federal law—to promote America's peaceful relations with other nations. *See The Federalist* No. 80 (A. Hamilton); *The Federalist* No. 83 (A. Hamilton). Judge Edwards cites this rationale as a reason for reading section 1350 as creating a cause of action for private parties. The inference from that rationale seems to me, however, to run in precisely the opposite direction. Adjudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations.

Under the possible meaning I have sketched, section 1350's current function would be quite modest, unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity.

V.

Whether current international law itself gives appellants a cause of action requires more extended discussion. Appellants' claim, in Count II of their complaint, is that appellees have committed the "torts of terror, torture, hostage-taking and genocide," Brief for Appellants at 29, in violation of various customary principles of international law. Such principles become law by virtue of the "general assent of civilized nations." *The Paquete Habana*, 175 U.S. at 694. Unlike treaties and statutes, such law is not authoritatively pronounced by promulgation in a written document but must be found in the "customs and usages of civilized nations" as evidenced by the works of "jurists and commentators." *Id.* at 700; *see* Statute

of the International Court of Justice, art. 38, 59 Stat. 1055 (1945), T.S. No. 993; *Restatement of the Foreign Relations Law of the United States (Revised)* §§ 102-103, at 24-38 (Tent. Draft No. 1, 1980) . Consequently, any cause of action that might exist, like the precise meaning of the customary principles themselves, must be inferred from the sources that are evidence of and attempt to formulate the legal rules. The district court found, and appellants have not argued to the contrary, that none of the documents appellants have put forth as stating the international legal principles on which they rely expressly state that individuals can bring suit in municipal courts to enforce the specified rights. *See* 517 F. Supp. at 548-49. Moreover, we have been pointed to nothing in their language, structure, or circumstances of promulgation that suggests that any of those documents should be read as implicitly declaring that an individual should be able to sue in municipal courts to enforce the specified rights. In any event, there is no need to review those documents and their origins in further detail, for, as a general rule, international law does not provide a private right of action, and an exception to that rule would have to be demonstrated by clear evidence that civilized nations had generally given their assent to the exception. Hassan, *supra*, 4 Hous. J. Int'l L. at 26-27.

International law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals. " 'Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights.' " *Dreyfus* v. *Von Finck*, 534 F.2d at 31 (quoting *Pauling* v. *McElroy*, 164 F. Supp. at 393). "[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 422-23.

This general relegation of individuals to a derivative role in the vindication of their legal rights stems from "[t]he traditional view of international law . . . that it establishes substantive principles for determining whether one country has wronged another." 376 U.S. at 422. One scholar explained the primary role of states in international law as follows:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 L. Oppenheim, *International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955). Even statements of individuals' rights or norms of individual conduct that have earned the universal assent of civilized nations do not become principles of international law unless they are "used by . . . states for their common good and/or in dealings *inter se*." *Lopes* v. *Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (footnote omitted). *See Cohen* v. *Hartman*, 634 F.2d 318, 319 (5th Cir. 1981) ("The standards by which nations regulate their dealings with one another *inter se* constitute the 'law of nations.'"); *IIT* v. *Vencap, Ltd.*, 519 F.2d at 1015 (ten commandments not international law for this reason).[25]

---

[25] Further evidence that "the Law of Nations is primarily a law between States" is the key role played by nationality in the availability to individuals of international legal protection. 1 L. Oppenheim, *supra*, at 640. Even nationals however, cannot themselves generally invoke that protection: "if individuals who possess nationality are wronged abroad, it is, as a rule, their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right." *Id.* (footnote omitted).

If it is in large part because "the Law of Nations is primarily a law between States," 1 L. Oppenheim, *supra*, at 636, that international law generally relies on an enforcement scheme in which individuals have no direct role, that reliance also reflects recognition of some other important characteristics of international law that distinguish it from municipal law. Chief among these is the limited role of law in the international realm. International law plays a much less pervasive role in the ordering of states' conduct within the international community than does municipal law in the ordering of individuals' conduct within nations. Unlike our nation, for example, the international community could not plausibly be described as governed by laws rather than men. "[I]nternational legal disputes are not as separable from politics as are domestic legal disputes . . . ." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 775 (Powell, J., concurring in the judgment).

International law, unlike municipal law (at least in the United States), is not widely regarded as a tool of first or frequent resort and as the last word in the legitimate resolution of conflicts. Nations rely chiefly on diplomacy and other political tools in their dealings with each other, and these means are frequently incompatible with declarations of legal rights. Diplomacy demands great flexibility and focuses primarily on the future rather than on the past, often requiring states to refrain, for the sake of their future relations, from pronouncing judgment on past conduct. *Cf. International Association of Machinists & Aerospace Workers* v. *OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Since states adopt international law to improve their relations with each other, it is hardly surprising in the current world that they should generally retain for themselves control over the ability to invoke it. Nor is it surprising that international law is invoked less often to secure authoritative adjudications than it is to bolster negotiating positions or to acquire public support for

foreign-relations policies. "By and large, nations have resisted third-party settlement of their disputes and adjudicative techniques have played a very limited role in their relations." Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 Va. J. Int'l L. 1, 1 (1982) (footnote omitted). One consequence is that international law has not been extensively developed through judicial decisions. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 88 ("The strongly political character of many international issues accounts for the relative paucity of judicial decisions in contemporary international law.").

This remains true even as international law has become increasingly concerned with individual rights. Some of the rights specified in the documents relied upon by appellants as stating principles of international law recognizing individual rights are clearly not expected to be judicially enforced throughout the world. *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. 1/777 (1948) (right to life, liberty, and security of person; right to freedom from arbitrary detention; right to leave country; right to practice religion; right to speak and assemble; right to freely elected government); International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (similar lists of rights); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1. Corr. 1, *reprinted in* 9 I.L.M. 101 (1970), 65 Am. J. Int'l L. 679 (1971) (similar list of rights). Some of the key documents are meant to be statements of ideals and aspirations only; they are, in short, merely precatory. *See* 1 L. Oppenheim, *supra*, at 745; 19 Dep't St. Bull. 751 (1948) (Universal Declaration on Human Rights "is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.") (remarks of U.S. representative to U.N. General Assembly) (quoted in L.

Henkin, R. Pugh, O. Schachter & H. Smit, *supra*, at 808). Some define rights at so high a level of generality or in terms so dependent for their meaning on particular social, economic, and political circumstances that they cannot be construed and applied by courts acting in a traditional adjudicatory manner. *E.g.*, Universal Declaration of Human Rights, *supra* (rights to work, to just compensation, to leisure, to adequate standard of living, to education, to participation in cultural life); Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) (rights to opportunity to develop in normal manner, to grow up in atmosphere of affection and of moral and material security, to develop abilities, judgment and sense of moral and social responsibility, and to play). Some expressly oblige states to enact implementing legislation, thus impliedly denying a private cause of action. *E.g.*, International Covenant on Civil and Political Rights, art. 2, *supra*;[26] American Convention on Human Rights, art. 2, *supra*.

---

[26] The International Covenant on Civil and Political Rights directs states to provide a forum for private vindication of rights under the Covenant. That provision, however, should not be taken to suggest the Covenant grants or recognizes a private right of action in municipal courts in a case like this. First, the Covenant directs states to provide forums only for the vindication of rights against themselves, not for the vindication of rights against other states. It is only the latter that raises all the political, foreign relations problems that lie behind international law's general rule against private causes of action; thus, even if the Covenant suggests recognition of a private cause of action for the former, it does not do so for the latter. Second, the Covenant does not itself say individuals can sue; rather, it leaves to states the fulfillment of an obligation to create private rights of action.

It is worth noting that the Human Rights Committee established by article 41 of the Covenant provides for complaints about a state's conduct to be brought only by another state and then only if the "defendant" state consents to the Committee's jurisdiction. An Optional Protocol, Annex to G.A. Res. 2200, 21 U.N. GAOR

It may be doubted that courts should understand documents of this sort as having been assented to as law by all civilized nations since enforcement of the principles enunciated would revolutionize most societies. For that reason, among others, courts should hesitate long before finding violations of a "law of nations" evidenced primarily by the resolutions and declarations of multinational bodies. *See* Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 Colum. L. Rev. 751, 772-74, 780-83 (1982). In any event, many of the rights they declare clearly were not intended for judicial enforcement at the behest of individuals. The express provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221, E.T.S. 5, of an international tribunal to which individuals may bring claims, thus evidencing states' ability to provide private rights of action when they wish to do so, is an extraordinary exception that highlights the general absence of individual-complaint procedures. Even that exception, moreover, is a far cry from the authorization of ordinary municipal-court enforcement. Current international human rights law, in whatever sense it may be called "law," is doubtless growing. But it remains true that even that branch of international law does not today generally provide a private right of action.

Appellants, therefore, are not granted a private right of action to bring this lawsuit either by a specific international legal right or impliedly by the whole or parts of international law.

Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), provides for individuals' complaints. As of 1980, it had been signed by thirty states; the United States is not among them. *See* L. Henkin, R. Pugh, O. Schachter & H. Smit, *Basic Documents Supplement to International Law* 336 (1980). *See generally* Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U.L. Rev. 1, 21-23 (1982).

VI.

In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit, which did not address the issue of the existence of a cause of action, held that section 1350 afforded jurisdiction over a claim brought by Paraguayan citizens against a former Paraguayan official. The plaintiffs, a father and daughter, alleged that the defendant had tortured his son, her brother, in violation of international law's proscription of official torture. To highlight what I believe should be the basis for our holding, it is worth pointing out several significant differences between this case and *Filartiga*.

First, unlike the defendants in this case, the defendant in *Filartiga* was a state official acting in his official capacity. Second, the actions of the defendant in *Filartiga* were in violation of the constitution and laws of his state and were "wholly unratified by that nation's government." 630 F.2d at 889. Third, the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is "clear and unambiguous" in its application to the facts in *Filartiga*, *id.* at 884, and about which there is universal agreement "in the modern usage and practice of nations." *Id.* at 883.

Thus, in *Filartiga* the defendant was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive. None of that can be said about this case. For these reasons, not all of the analysis employed here would apply to deny a cause of action to the plaintiffs in *Filartiga*.

I differ with the *Filartiga* decision, however, because the court there did not address the question whether in-

ternational law created a cause of action that the private parties before it could enforce in municipal courts. For the reasons given, that inquiry is essential.

VII.

The opinions in this case are already too long and complex for me to think it appropriate to respond in detail to Judge Edwards' and Judge Robb's arguments. A few points ought to be made, however, with respect to each of the other concurring opinions.

A.

First, Judge Edwards attributes to me a number of positions that I do not hold. *See* Edwards' op. at 7-8. For example, far from rejecting the four propositions he extracts from *Filartiga*, I accept the first three entirely and also agree with the fourth, but in a more limited form—namely, "section 1350 opens the federal courts for adjudication of rights already recognized by international law" but only when among those rights is that of individuals to enforce substantive rules in municipal courts.

Second, as noted earlier in this opinion, section 1350 provides jurisdiction for tort actions alleging violations of the "law of nations" and "treaties of the United States." No process of construction can pry apart those sources of substantive law; in section 1350, they stand in parity. If, as Judge Edwards states and *Filartiga* assumes, section 1350 not only confers jurisdiction but creates a private cause of action for any violation of the "law of nations," then it also creates a private cause of action for any violation of "treaties of the United States." This means that all existing treaties became, and all future treaties will become, in effect, self-executing when ratified. This conclusion stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary

effect in this little-noticed statute. This consideration alone seems to me an insuperable obstacle to the reading Judge Edwards and *Filartiga* give to section 1350.

Third, the implications of Judge Edwards' theory—that section 1350 itself provides the requisite cause of action—cause him so much difficulty that he is forced to invent limiting principles. Thus, the law enunciated in *Filartiga* is said to cover only those acts recognized as "international crimes," a category which he supposes not to be as broad as the prohibitions of the law of nations. This restriction may allay some, though by no means all, apprehensions about what courts may get themselves and the United States into, but it comes out of nothing in the language of section 1350. According to that statute, jurisdiction exists as to any tort in violation of the law of nations.

The "alternative formulation" my colleague espouses requires even more legislation to tame its unruly nature. Recognizing that this "alternative formulation" would open American courts to disputes "wholly involving foreign states," the concurrence erects a set of limiting principles. Three kinds of suits only are to be allowed: (1) by aliens for domestic torts committed on United States territory and that injure "substantial rights" under international law; (2) by aliens for "universal crimes" (no matter where committed); and (3) by aliens against Americans for torts committed abroad, "where redress in American courts might preclude international repercussions." Edwards' op. at 30. Aside from the unguided policy judgments which these definitions require, and whatever else may be said of them, it is clear that these limitations are in no way prescribed, or even suggested, by the language of section 1350. Rather, they are imposed upon that language for reasons indistinguishable from ordinary legislative prudence. The necessity for these judicially invented limitations merely highlights the error in the reading given section 1350.

Finally, in assessing a statute such as this—one whose genesis and purpose are, to say the least, in considerable doubt—some perspective is required. For a young, weak nation, one anxious to avoid foreign entanglements and embroilment in Europe's disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breathtaking folly—so breathtaking as to render incredible any reading of the statute that produces such results.

It is anomalous to suggest that such a reading is supported by Alexander Hamilton's concern, expressed in *The Federalist* No. 80, that aliens' grievances be redressable in federal courts. Hamilton was defending judicial authority which extended "to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves." *The Federalist* No. 80 (A. Hamilton). His concerns were very largely met by federal diversity jurisdiction, and, it would seem, would be entirely met by a section 1350 which had the historical meaning I have suggested above as plausible.

If section 1350 had been designed to provide aliens with redress in order to place in federal courts all those disputes about treaties and international law that might provoke international incidents, the jurisdiction given would not have been limited to torts only. The concurrence's response to this observation is to surmise a "compromise" for which there is absolutely no historical evidence.

But the trouble goes deeper than this. Judge Edwards' reading of the statute gives federal jurisdiction to suits between aliens for violations of international law and treaties of the United States. He suggests that

this is proper because "[a] denial of justice might create the perception that the United States is siding with one party, thereby affronting the state of the other." Edwards' op. at 22 n.13. This turns Hamilton's argument on its head. A refusal by a United States court to hear a dispute between aliens is much less offensive to the states involved than would be an acceptance of jurisdiction and a decision on the merits. In the latter case, the state of the losing party would certainly be affronted, particularly where the United States' interests are not involved. The United States would be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody.

Indeed, it seems to me that Judge Edwards' interpretion would require us to hear this case, thus thrusting the United States into this improper and undesirable role. It can be argued that appellants here have alleged "official" torture: the complaint alleges that the PLO, in carrying out its attack, which the complaint alleges to have included torture, was acting at the behest of and in conjunction with Libya. Viewed this way, this case is indistinguishable from *Filartiga*, and as such, Judge Edwards' approach would force us to hear it. In entertaining such a suit, one of the issues would be whether the relationship between the PLO and Libya constituted that of agent and principal, so that Libya should be held responsible for the PLO's actions. The prospect of a federal court ordering discovery on such an issue, to say nothing of actually deciding it, is, or ought to be, little short of terrifying. If anything is likely to disturb the "PEACE of the CONFEDERACY," this is.

If more needs to be said against the construction my colleague and the *Filartiga* court would give section 1350, it may be observed that their interpretation runs against the grain of the Constitution. It does so by confiding important aspects of foreign relations to the

Article III judiciary despite the fact that the Constitution, in Article II and Article I, places that responsibility in the President and Congress. That is the fundamental reason I have argued that it is improper for judges to infer a private cause of action not explicitly granted.

B.

Judge Robb misapprehends my position, equating it, in many respects, with Judge Edwards'. I have not read section 1350 as authorizing the courts to enter into sensitive areas of foreign policy: quite the contrary. As I have suggested, the statute probably was intended to cover only a very limited set of tort actions by aliens, none of which is capable of adversely affecting foreign policy. Since international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action that would direct courts to entertain cases like this one. Should such an improbable statute or treaty come into existence, it will be time to ask whether the constitutional core of the political question doctrine precludes jurisdiction. That inquiry would necessarily be constitutional in scope, for the prudential aspect of the doctrine would be insufficient to deny jurisdiction if Congress had tried to do what *Filartiga* supposes. Judge Robb apparently thinks that the constitutional core applies, since he invokes the political question doctrine without even inquiring whether the statute applies to a case like this.

Judge Robb chides me for stating that the PLO "bears significantly upon the foreign relations of the United States." He states that I thereby give that organization "more in the way of official recognition than [it] has ever before gained from any institution of the national government." As it happens, that is not correct. Nu-

merous officials of the United States have discussed the problems posed by the PLO for American foreign policy, including the President and the Secretary of State.[27] Judicial circumspection is certainly an admirable quality, but a court need not be so demure that it cannot even mention what the world knows and the highest officials of our government publicly discuss. It is, moreover, particularly startling to see the case for such extraordinary prudence made in an opinion that itself contains clear implications of responsibility for worldwide terrorism. It is surely self-defeating to engage in such speculations in order to avoid making the milder observation that the PLO affects our foreign relations.

Were the matter mine to decide, I would probably agree that the constitutional core of the political question doctrine bars this or any similar action. But I am bound by Supreme Court precedent and that precedent, in general and as it bears in particular upon the constitutional component of the doctrine, is most unclear. For that reason, and others I have specified, see *supra* pp. 62-63 & note 8, it seems better to rest the case upon the

---

[27] *See, e.g.*, Meeting with Hispanic, Labor, and Religious Press, 19 Weekly Comp. Pres. Doc. 1245, 1248-49 (Sept. 14, 1983) (President Reagan's response to question: "[O]ne of the reasons why we would never negotiate with the PLO, [is] because they openly said they denied the right of Israel to be a nation."); Foreign and Domestic Issues, Question-and-Answer Session with Reporters, 19 Weekly Comp. Pres. Doc. 643, 647-48 (May 4, 1983) (President Reagan's response to question: "[A]re they going to stand still for their interests being neglected on the basis of an action taken by this group, the PLO, which, as I say, was never elected by the Palestinian people?"); N.Y. Times, Nov. 10, 1983, at A12, col. 5 (remarks of Under Secretary of State for Political Affairs Lawrence S. Eagleburger). And, most recently, the New York Times reported on its front page Secretary of State George P. Shultz's comments that "the outcome of the struggle within the Palestine Liberation Organization was certain to have 'major implications' for the future of the American-sponsored peace efforts in the Middle East." N.Y. Times, Nov. 20, 1983, at A1, col. 5.

grounds I have chosen. The result is the same. I would have said that this course has the additional virtue of giving guidance to the bar, but, as matters have turned out, the three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed. In the meantime, it is impossible to say even what the law of this circuit is. Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable.

ROBB, *Senior Circuit Judge*: I concur in the result, but must withhold approval of the reasoning of my colleagues. Both have written well-researched and scholarly opinions that stand as testaments to the difficulty which this case presents. Both agree that this case must be dismissed though their reasons vary greatly. Both look backward to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and forward to the future efforts of others maimed or murdered at the hands of thugs clothed with power who are unfortunately present in great numbers in the international order. But both Judges Bork and Edwards fail to reflect on the inherent inability of federal courts to deal with cases such as this one. It seems to me that the political question doctrine controls. This case is nonjusticiable.

A. *This case involves standards that defy judicial application.*

Tort law requires both agreement on the action which constitutes the tort and the means by which it can be determined who bears responsibility for the unlawful injury. Federal courts are not in a position to determine the international status of terrorist acts. Judge Edwards, for example, notes that "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." Edwards Opinion at 46. This nation has no difficulty with the question in the context of this case, of course, nor do I doubt for a moment that the attack on the Haifa highway amounts to barbarity in naked and unforgivable form. No diplomatic posturing as represented in sheaves of United Nations documents—no matter how high the pile might reach—could convince me otherwise. But international "law", or the absence thereof, renders even the search for the least common denominators of civilized conduct in this area an impossible-to-accomplish judicial task. Courts ought not to engage in it when that search takes us towards a consideration of

terrorism's place in the international order. Indeed, when such a review forces us to dignify by judicial notice the most outrageous of the diplomatic charades that attempt to dignify the violence of terrorist atrocities, we corrupt our own understanding of evil.

Even more problematic would be the single court's search for individual responsibility for any given terrorist outrage. International terrorism consists of a web that the courts are not positioned to unweave. To attempt to discover the reach of its network and the origins of its design may result in unintended disclosures imperiling sensitive diplomacy. This case attempts to focus on the so-called P.L.O. But which P.L.O.? Arafat's, Habash's, or Syria's? And can we conceive of a successful attempt to sort out ultimate responsibility for these crimes? Many believe that most roads run East in this area.[1] Are courts prepared to travel these highways? Are they equipped to do so? It is one thing for a student note-writer to urge that courts accept the challenges involved.[2]

---

[1] *See, e.g. Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II*, 97th Cong., 2d Sess. 20 (Statement of Michael A. Ledeen) ("[M]any terrorist organizations get support from the Soviet Union and its many surrogates around the world. I do not think there should be much doubt about the matter. The Russians train PLO terrorists in the Soviet Union, supervise the training of terrorists from all over the world in Czechoslovakia—or at least they did until recently, according to a leading defector, General Jan Sejna—and work hand in glove with countries like Libya, Cuba, and South Yemen in the training of terrorists.") *See also* Adams, *Lessons and Links of Anti-Turk Terrorism*, Wall St. J., Aug. 16, 1983, at 32, col. 6 (The Armenian Secret Army for the Liberation of Armenia "remains a prime suspect for the charge of KGB manipulation of international terror. But in this area, one researcher in the field advises, 'You will never find the smoking gun'."); Barron, *KGB* 151, 255-257 (1974); Barron, *KGB Today: The Hidden Hand*, 21-22, 255-256 (1983).

[2] Note, *Terrorism as a Tort in Violation of the Law of Nations*, 6 Fordham Int'l L.J. (1982).

It is an entirely different matter for a court to be asked to conduct such a hearing successfully. The dangers are obvious. To grant the initial access in the face of an overwhelming probability of frustration of the trial process as we know it is an unwise step. As courts could never compel the allegedly responsible parties to attend proceedings much less to engage in a meaningless judicial process, they ought to avoid such imbroglios from the beginning.

B. *This case involves questions that touch on sensitive matters of diplomacy that uniquely demand a single-voiced statement of policy by the Government.*

Judge Bork's opinion finds it necessary to treat the international status of the P.L.O., and to suggest that that organization "bears significantly on the foreign relations of the United States." Bork Opinion at 67. This is considerably more in the way of official recognition than this organization has ever before gained from any institution of the national government. I am not in a position to comment with authority on any of these matters. There has been no executive recognition of this group, and for all our purposes it ought to remain an organization "of whose existence we know nothing . . ." *United States v. Klintock*, 18 U.S. 144, 149 (5 Wheat.) (1820). As John Jay noted: "It seldom happens in the negotiations of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite." *The Federalist*, #64, Jay (Paul L. Ford, ed.). What was then true about treaties remains true for all manner of modern diplomatic contacts. It may be necessary for our government to deal on occasion with terrorists. It is not, however, for courts to wonder aloud as to whether these negotiations have, are, or will be taking place. Western governments have displayed a near uniform reluctance to engage in much discussion on the organization and operation of terrorist groups, much less on any hidden contacts

with them.[3] When a genre of cases threatens to lead courts repeatedly into the area of such speculations, then that is a signal to the courts that they have taken a wrong turn. The President may be compelled by urgent matters to deal with the most undesirable of men. The courts must be careful to preserve his flexibility and must hesitate to publicize and perhaps legitimize that which ought to remain hidden and those who deserve the brand

---

[3] C. Sterling, *The Terror Network* (1981). Sterling repeatedly points out, and often criticizes, the reluctance of Western governments to openly detail the international cooperation that girds most terrorist activities. She writes:

> No single motive could explain the iron restraint shown by Italy, West German [sic], and all other threatened Western governments in the face of inexorably accumulating evidence. . . . Both, and all their democratic allies, also had compelling reasons of state to avoid a showdown with the Soviet Union. . . . All were certainly appalled at the thought of tangling with Arab rulers. . . .
>
> [P]olitical considerations were almost certainly paramount for government leaders under seige who . . . wouldn't talk.

Id. at 291, 294. Whatever the merits of Sterling's criticisms of this near uniform silence, the fact remains that our government, like those of its closest allies, is extremely wary of publicity in this area. Commenting on the refusal of Western governments to openly discuss the possibility of Soviet complicity in the attempt to assassinate Pope John Paul II, Congressman Ritter, a member of the bipartisan commission drawn from both the executive and legislative branches which is charged with monitoring compliance with the Helsinki Accords, commented that "[t]he involved governments have stayed away from this hot potato for a variety of reasons." *Implementation of the Helsinki Accords, Hearing Before the Commission on Security and Cooperation in Europe, The Assassination Attempt on Pope John Paul II, supra,* at 16. Both Sterling's book and the hearings in which Congressman Ritter participated are indispenable background reading for a court confronted with a question such as the one before us. These and other texts bring home the hopelessness of any attempt by an American court to trace a reliable path of responsibility for almost every terrorist outrage. These labyrinths of international intrigue will admit no judicial Theseus.

of absolute illegitimacy. By jumping the political question threshold here, my colleagues appear to be leading us in just the opposite direction.

C. *Questions connected to the activities of terrorists have historically been within the exclusive domain of the executive and legislative branches.*

The conduct of foreign affairs has never been accepted as a general area of judicial competence. Particular exceptions have, of course, arisen. When the question is precisely defined, when the facts are appropriately clear, the judiciary has not hesitated to decide cases connected with American foreign policy.[4]

But cases which would demand close scrutiny of terrorist acts are far beyond these limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases. That traditional deference to the other branches has stemmed, in large part, from a fear of undue interference in the affairs of state, not only of this nation but of all nations. Judge Mulligan, writing in *Hunt v. Mobile Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), warned that a "Serbian Bog" awaits courts that inquire into the policies of foreign sovereigns. *Id.* at 77. A model of judicial deference, appropriately invoked, is *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976). In that case this court was asked to enforce a United Nations Security Council Resolution. This court ruled in effect that the matter was nonjusticiable, and a part of the reasoning supporting that conclusion was that the Resolution did not provide specific standards suitable to "conventional adjudication". *Id.* at 851. The court added that the standards that were supplied were "foreign to the general experience and

---

[4] *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy are rarely proper subjects for judicial intervention."); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

function of American courts". *Id.* In refusing to allow the case to be jimmied into our judicial process, the court was fully aware that its deference did not abdicate all American participation in the issues raised by the Resolution. Our nation's involvement in the diplomatic arena was in no way circumscribed by judicial circumspection.

Similarly, the issues raised by this case are treated regularly by the other branches of the national government. One need only review the work of the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary to recognize that the whole dangerous dilemma of terrorism and the United States response to it are subjects of repeated and thorough inquiry. *See, e.g., Historical Antecedents of Soviet Terrorism Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary,* 97th Cong., 1st Sess. 1 (1981). *See also, Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 1 (1982). The executive branch is also deeply involved in the monitoring and attempted control of terrorists activities. *See, e.g., The Role of Cuba in International Terrorism and Subversion, Intelligence Activities of the DGI, Before the Subcomm. on Security and Terrorism of the Senate Comm. on Judiciary,* 97th Cong., 2d Sess. 85 (1982) (statement of Fred C. Ikle, Undersecretary of Defense for Policy). The President has repeatedly demonstrated his concern that terrorism be combated, both in his statements at home, and in the declarations that have accompanied his meetings with our allies. *See* 18 *Weekly Compilation of Presidential Documents,* 35, 575, 763, 783, 1352 (1982). It is thus obvious that even with this declaration of nonjusticiability by the court, the work of tracing and assessing responsibility for terrorist acts will continue by those parts of the government which by tradition and accumulated expertise are far better positioned than the courts to conduct such inquiries.

D. *Cases such as this one are not susceptible to judicial handling.*

As noted above in section A, the pragmatic problems associated with proceedings designed to bring terrorists to the bar are numerous and intractable. One other note must be added. Courts have found it extremely difficult to apply the "political exception" doctrine in extradition proceedings when those proceedings have concerned prisoners who are accused of terrorist activities. *See Abu Eain v. Adams*, 529 F.Supp. 685 (N.D. Ill. 1980) *and McMullen v. Immigration and Naturalization Service*, 685 F.2d 1312 (9th Cir. 1981). This difficulty is so pronounced that one member of the executive branch has testified to Congress that there is simply "no justiciable standard to the political offense," and that when courts have been confronted with such situations, "there has been a tendency for a breakdown in the ability of our courts to process extradition questions," with the result that courts "tend to beg the question . . .". *Extradition Reform Act of 1981, Hearings on H.R. 5227 Before Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 24-25 (Testimony of Roger Olson, Deputy Asst. Attorney General, Criminal Division, U.S. Dept. of Justice). If courts are vexed by these questions within the limited context of extradition proceedings—an area in which there is considerable judicial experience—it is easy to anticipate the breakdowns that would accompany proceedings under 28 U.S.C. § 1350 if they are allowed to go forward. Sound consideration of the limits of judicial ability demands invocation of the political question doctrine here. This is only common sense and a realistic measure of roles that courts are simply not equipped to play.

E. *The possible consequences of judicial action in this area are injurious to the national interest.*

The certain results of judicial recognition of jurisdiction over cases such as this one are embarrassment to the

nation, the transformation of trials into forums for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct.

We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*.[5] But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaraugua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States. The victims of the recent massacres in Lebanon could also mount such claims. Indeed, there is no obvious or subtle limiting principle in sight. Even recog-

---

[5] I do not doubt for a moment the good intentions behind Judge Kauffman's opinion in *Filartiga*. But the case appears to me to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure. The refusal to separate rhetoric from reality is most obvious in the passage which states that "for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. This conclusion ignores the crucial distinction that the pirate and slave trader were men without nations, while the torturer (and terrorist) are frequently pawns, and well controlled ones, in international politics. When Judge Kauffman concluded that "[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence," *id.*, he failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat. The political question doctrine is designed to prevent just this sort of judicial gambling, however apparently noble it may appear at first reading.

nized dissidents who have escaped from the Soviet Union could conceivably bring suit for violations of international law having to do with the conditions of their earlier confinements. Each supposed scenario carries with it an incredibly complex calculus of actors, circumstances, and geopolitical considerations. The courts must steer resolutely away from involvement in this manner of case. It is too glib to assert simply that courts are used to dealing with difficult questions. They are not used to this kind of question.

The more arcane aspects of international law connected to this case are dealt with by my colleagues. Their reviews of the subject are quite exhaustive and their speculations on the riddle of § 1350 are innovative. But it is all quite unnecessary. Especially inappropriate is their apparent reliance for guidance on the distinguished commentators in this field. I agree with the sentiment expressed by Chief Justice Fuller in his dissent to *The Paquete Habana*, 175 U.S. 677 (1900), where he wrote that it was "needless to review the speculations and repititions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative." *Id.* at 720 (Fuller, J. dissenting). Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".

Judge Edwards writes that "[t]his case deals with an area of law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel

questions about the definition and application of the 'law of nations'." Edwards Opinion at 4. I must disagree. When a case presents broad and novel questions of this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed. We ought not to parlay a two hundred years-old statute into an entree into so sensitive an area of foreign policy. We have no reliable evidence whatsoever as to what purpose this "legal Lohengrin", as Judge Friendly put it, was intended to serve. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). We ought not to cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate. To allow § 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. Every consideration that informs the sound application of the political question doctrine militates against this result. My colleagues concede that the origins and purposes of this statute are obscure, but it is certainly obvious that it was never intended by its drafters to reach this kind of case. Accordingly, I concur in the decision to affirm the dismissal of this case.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN, *etc., et al.*,
Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,
Plaintiffs,

v.

LIBYAN ARAB REPUBLIC,
Defendant.

MEMORANDUM OPINION AND ORDER

[Filed June 30, 1981]

These two actions allege multiple tortious acts as the result of the March 11, 1978 attack on a bus containing numerous citizens of and visitors to Israel, that occurred on a main highway between Haifa and Tel Aviv, Israel. The matter was widely reported in the international press. The complaints charge the various defendants with torts in violation of both international law and criminal statutes of the United States of America, and seek compensatory and punitive damages.

Plaintiffs in Civil Action No. 81-0563 are the personal representatives of twenty-nine persons who died in the carnage, and in Civil Action No. 81-0564 are the individuals injured. Defendants are the Libyan Arab Republic ("Libya"), the Palestine Liberation Organization ("PLO"), the Palestine Information Office ("PIO"), the National Association of Arab Americans ("NAAA"), and the Palestine Congress of North America ("PCNA").[1]

Pending before the Court are the motions of the PCNA and the PIO for summary judgment, and the motion of the NAAA to dismiss the actions for lack of subject matter jurisdiction and because they are barred by the statute of limitations.

Plaintiffs allege four separate bases of jurisdiction: 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity of citizenship), 28 U.S.C. § 1350 (the statute providing for jurisdiction of actions brought by an alien alleging a tort in violation of the laws of the United States or the law of nations), and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, §§ 1602-1611.

For a cause of action to satisfy the requisite elements of federal question jurisdiction, it must state a cause of action arising under the Constitution, laws, or treaties of the United States. The NAAA, in its motions to dismiss, argues that these actions do not emanate under the laws or treaties of the United States because there is no cause of action expressly provided by or implied in the criminal statutes cited by plaintiffs, because there is no nexus between plaintiffs' causes of action and federal law, and

---

[1] Although service has not been completed on Libya or the PLO and notwithstanding the absence of two of the five defendants, the Court ordered the parties to file motions as to the jurisdictional question on an expedited basis. For purposes of the instant motion, the two actions will be consolidated because of the presence of common questions of law and fact. Fed. R. Civ. P. 42(a).

because no treaty cited by plaintiffs gives them an express private cause of action. Plaintiffs maintain that the acts complained of clearly violate the law of nations, which has been held to be part of the federal common law, and that the treaties allegedly violated by defendants permit them to bring private actions to vindicate their rights.

Critically, a complaint requires the application of some aspect of federal law to survive a jurisdictional assault under § 1331. *See Gomez v. Wilson*, 477 F.2d 411, 420 (D.C. Cir. 1973); *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 493 (2d Cir. 1968). Plaintiffs contend that they assert causes of action that require the application of both federal criminal statutes and the federal common law including the law of nations.

In an argument beyond dispute the NAAA maintains, and plaintiffs do not disagree, that none of the several criminal statutes cited in the complaint specifically provides plaintiffs a private right of action. Whether a statute creates an implied private right of action depends on whether the plaintiff is a member of a class for whose special benefit the federal statute was enacted, whether there is any evidence of legislative intent to create or deny a private right of action, whether the underlying purposes of the statutory scheme are consistent with implying a remedy for the plaintiff, and whether the cause of action is one traditionally considered under state law. *Cort v. Ash*, 422 U.S. 66 (1975).

18 U.S.C. §§ 956, 960 are aimed at conspiracies to injure foreign governments and any activity that occurs in the United States in preparation for an expedition against a nation friendly to our own. In no way do these statutes include individuals such as the plaintiffs within their umbrella of relief. 18 U.S.C. § 957 offers protection to the United States, because it punishes activity, with

the aid of any foreign government, aimed at violations of American law. Moreover, the piracy statutes, found at 18 U.S.C. §§ 1651-1661, focus on activity on the high seas and in connection therewith. Not one of these statutes offers protection to plaintiffs as a member of a particular class, and there is no indication that Congress intended that they be anything but criminal statutes.

Abandoning their position that federal criminal law gives them a right of action, plaintiffs then resort to the claim that numerous treaties and international conventions, to which the United States is a party, offer them a basis for federal jurisdiction. Plaintiffs' complaints refer the Court to the Geneva Convention for the Protection of Civilian Persons in Time of War (August 12, 1949); Protocols I and II to the Geneva Convention of 12 August 1949 (June 7, 1977); the Charter of the United Nations; the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, United Nations General Assembly Resolution 2625 (XXV), October 24, 1970); Universal Declaration of Human Rights, General Assembly Resolution 217(A)(III) (December 10, 1948); the International Covenant on Civil and Political Rights, General Assembly Resolution 2200(A)(XXI) (December 16, 1966); the Basic Principles for Protection of Civilian Populations in Armed Conflicts, General Assembly Resolution 2675 (XXV) (December 9, 1970); the Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of Wars on Land; the Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260A (III) (December 9, 1948); the Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) (1959); the American Convention of Human Rights, OAS Treaty Series No. 36 (November 22, 1969); the Geneva Convention Relative to the Treatment of Prisoners of War (August 12, 1949); and the Organization of American States: Convention to Prevent and Punish Acts of Terrorism (February 2, 1971).

When defendants proffer that eight of these treaties are not presently obligations of the United States, plaintiffs counter that "the fact that some of these documents may not have been ratified or may not constitute treaties is totally irrelevant to the question of what is the law of nations. . . ." Pl. Mem. in Opp. at 15, n.22. It is correct that the body of international law is not determined merely by examining the obligations of the United States. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). The question whether the conduct complained of here violated the law of nations, a question the court does not reach, is fundamentally different, however, from the question whether treaties or even international law generally provide the plaintiffs with a cause of action.

In maintaining that their actions indeed state claims for recovery under treaties and the law of nations, plaintiffs ignore the fundamental proposition, articulated one hundred fifty-two years ago by Chief Justice Marshall in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), that treaties must provide expressly for a private right of action before an individual can assert a claim thereunder in federal court. In a clairvoyant passage, marked by restraint, that eminent jurist declared:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department.

Id. at 314.

Courts have thereafter held consistently that only treaties with a specific provision permitting a private action, or one to be clearly inferred, may suffice as the basis for federal jurisdiction. Otherwise, no cause of action is stated and no federal law is applicable to the claim presented. *See Head Money Cases*, 112 U.S. 580 (1884); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd on other grounds* 311 U.S. 170 (1941); *George E. Warren Corp. v. United States*, 94 F.2d 597 (2d Cir. 1938), *cert. denied* 304 U.S. 572; *Canadian Transport Co. v. United States*, 430 F. Supp. 1168 (D.D.C. 1977) *aff'd in part and rev'd and remanded in part on other grounds*, No. 77-1693 (D.C. Cir., filed Sept. 5, 1980); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

In *Z & F Assets*, this Circuit was confronted with a petition for an injunction prohibiting the government from paying awards made by an international commission created after World War I. The Court found that the plaintiffs had no right to raise the claim. "Although an individual claimant may have a moral right to participate in an award, as a matter of strict legal or equitable right he has none." 114 F.2d at 472. Judge John H. Pratt of this District Court, in the *Canadian Transport* case, declared that absent a provision giving private parties the right to enforce the treaty in court, "the courts can give no redress to a person who is injured by a failure of a government to observe the terms of a treaty; such is a political question and one claiming injury must look to his government for relief." 430 F. Supp. at 1172. He also noted, "[A] federal court has no inherent power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation if the Government of the United States, as a sovereign power, chooses to disregard it." *Id.* Surely, the courts cannot exercise greater power over foreign governments who allegedly violate treaty provisions than could

be exercised over the United States government for such a violation.

Another instructive precedent is *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976). Judge Leventhal considered the contention of the plaintiff that the courts should demand enforcement of a United Nations' Resolution calling among member states to have no dealings with South Africa. Affirming the district court's dismissal, the Court of Appeals held that no private right of enforcement existed. Judge Leventhal observed "[T]he U.N. resolution underlying the obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation." *Id.* at 850. *See also Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3rd Cir. 1979) ("Unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action.")

There are two acceptable guidelines to determine when a treaty might permit an individual cause of action. If the treaty calls for the signatory nations to enact legislation implementing the agreement, the treaty is considered executory and no private rights are conferred by it. *United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). If the treaty demonstrates an intent that private actions be implied, then a court may recognize that the treaty is enforceable in such individual actions. *See Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976).

The NAAA documents that some of the particular treaties subscribed to by the United States and outlined in the complaint have been expressly held not to provide a private right of action. *See Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (the Geneva Convention of Aug. 12, 1949); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd* 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (the United Nations' Char-

ter). *Cf. Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976) (United Nations Resolutions not conferring rights to individual citizens and not providing specific standards).

The remainder of plaintiffs' citations to international law are equally devoid of authority finding a private right of action thereunder. The Protocols of the Geneva Convention signed June 7, 1977 are silent as to enforcement by individuals, but because they establish an international commission as means of seeking compliance, they cannot fairly be said to imply private action. By calling on signatory nations to enact implementing legislation, three of plaintiffs' sources expressly deny a private right of action. *See* United Nations General Assembly Resolution 260A, Article V; Geneva Convention Relative to Treatment of Prisoners of War, Article 129; American Convention of Human Rights, Article 28. *See also United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). Finally, the OAS Convention to Punish and Prevent Acts of Terrorism obligates its parties, in Article 1, 3, and 8, to take action consistent with their "own laws," implying that the Convention is not meant to be completely executory. The plaintiffs have been unable to muster persuasive authority or argument that international law provides them a cause of action and their pleas must therefore succumb to the determination that their cases lack such basis for jurisdiction.

Without any foundation in federal statutes or treaties to assert a cause of action, plaintiffs next maintain that their claims arise under the federal common law which includes the law of nations. The NAAA proffers, though, that the assertion of federal common law ignores their earlier argument that federal law must somehow be pivotal in the dispute. This argument begs the question—if the law of nations is a part of the federal common law, and plaintiffs allege violations of the law of nations,

then "federal" law is central to the dispute. Nonetheless, plaintiffs' assertion that they state in each case a cause of action is not supported.

The contention that plaintiffs can state a cause of action under federal common law, comprised in part by the law of nations, appears to frustrate the traditional strictures placed on the championing of claims under international law. The requirement that international law provide a private right of action produces no less compelling reason as concerns the law of nations than it does when treaties are involved. To permit plaintiffs to assert under § 1331 claims under the law of nations notwithstanding the absence of private rights of action—express or implied—sanctions judicial interference with foreign affairs and international relations, traditionally an area where courts have chosen to stay their hands absent some fundamental constitutional violation. *See generally Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972); *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964). Thus, even in the face of their extraordinary plight, the plaintiffs fail to state a cause of action arising under the Constitution, laws, or treaties of the United States because neither the criminal statutes, the treaties, nor the law of nations cited by plaintiffs provides a cause of action through these courts to individuals to seek redress of alleged human rights violations.

As a separate basis of jurisdiction, plaintiffs assert that this court has power to hear their claim under the Alien Tort Claims Act, 28 U.S.C. § 1350, which states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This obscure jurisdictional grant recently was reawakened in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), where the Court accepted jurisdiction over the claim of a Paraguayan national against a former

official of the Paraguayan government for the alleged torture of his son. Plaintiffs seek to persuade this Court that the mandate of *Filartiga* in that instance should envelop denial of the defendants' motions.

For jurisdiction to vest under § 1350, three elements must be present: 1) the claim must be made by an *alien*, 2) it must be for a *tort*, and 3) the tort must be *in violation of the law of nations or the treaties of the United States*. Initially, plaintiffs' complaints suffer defect in that some of the plaintiffs and their personal representatives are citizens of the United States and cannot invoke a claim under § 1350. In Civil Action No. 81-0563, Hanoch Tel-Oren is a citizen of the United States, and in Civil Action No. 81-0564, six members of the Tel-Oren family claim United States citizenship. This, however, is not a fatal defect to the entire litigation, because plaintiffs could amend their complaint to satisfy the first element under the Alien Tort Claims Act.

The allegations make clear that these actions sound in tort, and plaintiffs contend that the torts are in violation of the law of nations or the treaties of the United States. Defendants do not dispute these claims, averring instead that the complaints do not state actions in tort against the NAAA, the PCNA, or the PIO.

As to the PCNA, the NAAA, and the PIO, plaintiffs' allegations of tortious conduct and conspiracy are clearly insubstantial. The complaints allege that those three organizations raised funds to support the attack on the plaintiffs, but there are no specific allegations whatsoever to support a claim of conspiracy. Moreover, plaintiffs' statement as to the events which occurred in the United States, *see, e.g.*, Civil Action No. 81-0563, Complaint at ¶ 49, is vague and conclusory. The averments as to the responsibility of the defendants similarly rest on conclusory suggestions that the NAAA, the PCNA, and the PIO acted in furtherance of the conspiracy to arm [sic] the plaintiffs. *See id.* at ¶¶ 52-54.

These three defendants have not been connected to the claimed torts sufficiently to permit the action to proceed against them. Various courts have considered complaints such as the instant one and held that vague, conclusory allegations of conspiracy are insufficient to predicate an action for damages. *See Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972); *Granville v. Hunt*, 411 F.2d 9, 11 (5th Cir. 1969); *Connor v. Real Title Corp.*, 165 F.2d 291, 294 (4th Cir. 1947). Simply put, plaintiffs have not satisfied the requirement of § 1350 that a tort be stated in violation of the law of nations or a treaty of the United States against the NAAA, the PCNA, or the PIO.

As to all defendants, however, the complaint must be dismissed because there is no jurisdiction under § 1350. That statute serves merely as an entrance into the federal courts and in no way provides a cause of action to any plaintiff. Somewhere in the law of nations or in the treaties of the United States, the plaintiffs must discern and plead a cause of action that, if proved, would permit the Court to grant relief. The plaintiffs cite no cause of action given to them by the law of nations or by treaties of the United States. Just as discussed under § 1331, an action predicated on a treaty or on more general norms of international law must have at its basis a specific right to a private claim.[2] Plaintiffs have demonstrated no such entitlement. "[T]o interpret international human rights law to create a federal private right of action overstates the level of agreement among nations on remedies for human rights violation." Note, *Torture as a Tort in Violation of International Law*: Filartiga v. Pena-Irala,

---

[2] Indeed, plaintiffs themselves recognize that the jurisdictional bases of § 1331 and § 1350 are identical as to the role of the law of nations. "The jurisdiction of this Court, pursuant to § 1331 and § 1350 therefore are the same. This jurisdictional basis is the violation of international law which creates a federal question because international law is part of the federal common law and the laws of the United States." Pl. Opp. to NAAA at 22.

33 Stan. L. Rev. 353, 357 (1981). Indeed, it is significant that the provision of private rights of action in recent international conventions has stalled efforts in the United States Senate to gain ratification. *See* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Intl. L. J. 53, 71-72 n. 82 (1981); Note, *supra*, at 359 ("In the United States, for example, an international agreement banning genocide has gone unratified chiefly because the Senate did not want to expose American citizens to suits in foreign countries.") In short, unless treaties to which the United States is a party or even the law of nations generally provide a private right of action, no jurisdictional grant, be it § 1331 or § 1350, can aid a plaintiff seeking relief in federal district court.[3]

The absence of an individual enforcement mechanism in this area does not subject a complaint to dismissal merely for failure to state a claim under Fed. R. Civ. P. 12(b)(6). That inquiry would be limited to a determination whether plaintiffs' complaint, if proved, would

---

[3] In addition to jurisdiction under § 1331 and § 1350, plaintiffs cited the diversity statute, § 1332, and the Foreign Sovereign Immunities Act, §§ 1330, 1602-1611. The NAAA argued strenuously that jurisdiction was improper under both of these statutes, and plaintiffs did not respond. Defendant NAAA is unquestionably correct. As to the diversity of citizenship, the presence of aliens on both sides of the contest removes the power of the federal courts to hear the action under § 1332. *See* Montalet v. Murray, 8 U.S. (4 Cranch) 46 (1807); Field v. Volkswagenwerk AG, 626 F.2d 293 (3rd Cir. 1980). As to the Foreign Sovereign Immunity [sic] Act, it is undoubted that sovereign immunity is still in effect for tort claims unless injury or death occurs within American borders. Letelier v. Republic of Chile, 488 F. Supp. 665, 674, *judgment awarded*, 502 F. Supp. 259 (D.D.C. 1980). These plaintiffs' injuries occurred in Israel. Moreover, the Act could not serve as a basis for jurisdiction over the NAAA, the PCNA, the PIO because it applies only to a foreign state.

meet the requirements of traditionally defined civil actions. Rather, because "[t]he reference [in § 1350] to the law of nations must be narrowly read if the section is to be kept within the confines of Article III," *IIT* [sic] *v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), it follows that it is a jurisdictional prerequisite to § 1350 that a complaint not only plead a private right of action but that the subsequent motions support this allegation. Otherwise, federal courts would clutch power over cases, under the guise of the law of nations, undoubtedly casting effect on international relations and foreign policy when no country, friend or foe, has consented to an American court opening its door to one alleging violations of international legal principles. In the end, of course, it behooves the court to discern promptly in cases such as the instant whether international law has expressly or impliedly entrusted individuals with the authority to enforce its precepts. Because that determination may ultimately cloak a court with potent authority over a foreign land, the query is jurisdictional, not merely a demurrer to the plaintiffs' complaint. Absent the clear indication, not present here, that nations intend to subject themselves to such worldwide jurisprudential assaults, jurisdiction under § 1350 will not vest.

The NAAA raises a wholly separate and distinct issue from its jurisdictional attack with its contention that the actions are barred by the statute of limitations. The defendant maintains that the torts alleged by plaintiffs, under whatever label might be given to them, are intentional torts like those in D.C. Code 12-301(4), for which a one year limitation period is provided. Plaintiffs assert that the torts they allege fall under the residual limitation period provided by D.C. Code 12-301(8) of three years, and that the application of the one year period would suppress federal policies and values underlying international law.

Unless a limitation is specifically provided by federal statute or treaty, a federal court must look to the limitations period of the district in which it sits and apply the most analogous statute. *Steorts v. American Airlines, Inc.*, No. 79-1215 (D.C. Cir. filed Feb. 19, 1981). Count I of the complaint asserts torts of "assault, battery, false imprisonment, intentional infliction of emotional distress and/or intentional infliction of cruel, inhuman and degrading treatment." Complaint, Civil Action No. 81-0563 ¶ 64; Complaint, Civil Action No. 81-0564 ¶ 71. Unquestionably, the torts of assault, battery, and false imprisonment are barred by the one year statute of limitations, D.C. Code 12-301(4). The question arises whether the other allegations are much like those torts enumerated in § 12-301(4) or whether they are different enough to justify the application of the three year period in § 12-301(8).

It is well accepted that the "label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states." *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 148 (D.C. Cir. 1951). *See also Johnson v. United States*, 547 F.2d 688 (D.C. Cir. 1976); *Universal Airline v. Eastern Air Lines*, 188 F.2d 993 (D.C. Cir. 1951) ("the statute of limitations . . . cannot be evaded by referring to [a] cause of action in some other terms." *Id.* at 996). Clearly, the torts alleged in Count I are dependents of the same personal interests infringed by the intentional torts that would be subject in the District of Columbia to the one year limitation period. Plaintiffs' contention that the one year period is unreasonably short, stultifying important federal and international policies, is unsupported especially in consideration that no causes of action are provided in the cited treaties or in the body of international law generally.

As to Counts II-V, alleging various torts claimed to be defined by international law, the same analysis would apply. Substantively, they are no different from the claims in Count I; they simply attempt to state a cause of action under different sources, e.g., treaties, federal common law, and the law of nations. Plaintiffs' contention that the NAAA fraudulently concealed facts about the cause of action, justifying the tolling of the limitations period, has no basis in the complaint and has not been pleaded specifically. *See* Fed. R. Civ. P. 9(b).

As these actions are now dismissed, no inference, implication, or comment is to be drawn about this Court's view of the merits.[4] Rather, the dismissals represent findings that when the Framers crafted Article III and when the first Congress considered jurisdictional grants to the federal courts, they did not contemplate the use of the federal courts as a substitute for an international tribunal, adjudicating claims arising under international law, when no private right of action was provided.[5]

---

[4] Despite the absence of two of the named plaintiffs [sic], Libya and the PLO, it is of course within the Court's power to dismiss the action where it appears that jurisdiction lacks. Fed. R. Civ. P. 12(h)(3). Moreover, the failure to state a cause of action and the bar of the statute of limitations apply generally to the plaintiffs as against all defendants. It is recognized that unique legal questions have been posited, warranting expedited treatment of the jurisdictional issues. Because the Court lacks jurisdiction to consider the merits of plaintiffs' cases, the motions of the PCNA and of the PIO for summary judgment need not be addressed.

[5] The possible presumptuousness of private human rights lawsuits is self-evident. Imagine a suit brought in Mexico, for example, by the Black Panther Party against the visiting chief of police of Philadelphia, alleging violations of international conventions prohibiting genocide and systematic racial discrimination. Certainly, such an application of international law would meet stiff, and legitimate, opposition in the United States.

Note, *supra*, at 359.

Accordingly, it is this 30th day of June, 1981

ORDERED, that these actions are dismissed for lack of jurisdiction and because they are barred by the statute of limitations.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

APPENDIX C

UNITED STATES: MEMORANDUM FOR THE UNITED STATES SUBMITTED TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *FILARTIGA* v. *PENA-IRALA* *

(Torture; Human Rights Obligations; Judicially Enforceable Remedies)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-6090

DOLLY M.E. FILARTIGA and DR. JOEL FILARTIGA,
Plaintiffs-Appellants

v.

AMERICO NORBERTO PENA-IRALA,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

---

* [Reproduced from the text provided by the U.S. Department of State. The memorandum was mailed to all counsel on May 29, 1980].

INTRODUCTION

The United States files this memorandum in response to the Court's request that "the Department of State submit a memorandum setting forth its position concerning the proper interpretation of 28 U.S.C. § 1350 in light of the facts of this case." [1] The memorandum addresses the following questions:

1. Whether the torture of a foreign citizen by an official of the same country is a violation of the law of nations within the meaning of 28 U.S.C. 1350?

2. If so, whether such a violation gives rise to a judicially enforceable remedy and is therefore a tort within the meaning of that provision?

STATEMENT

This appeal involves the interpretation of 28 U.S.C. 1350, which gives the district courts jurisdiction in all cases when an alien sues for "a tort only, committed in violation of the law of nations or a treaty of the United States." The complaint alleges that defendant, acting under color of his authority as a Paraguayan official, tortured and killed Joel Filartiga, a Paraguayan national, and that this conduct was a tort in violation of the law of nations. The district court nonetheless held that it lacked jurisdiction. The court acknowledged the strength of plaintiffs' argument that torture violates international law, but concluded that dismissal was compelled by two prior decisions of this Court, *ITT* v. *Vencap, Ltd.*, 519 F.2d 1001 (1975), and *Dreyfus* v. *Von*

---

[1] Letter from A. Daniel Fusaro, Clerk, to Roberts B. Owen, October 29, 1979. Under 28 U.S.C. 516, the conduct of litigation in which the United States or an agency is interested is reserved to the Department of Justice. For that reason, the Department of Justice is filing this memorandum, developed jointly by the Department of Justice and the Department of State.

Finck, 534 F.2d 24 (1976), cert. denied, 429 U.S. 835, which it read to establish that (A. 107-108)[2]—

> conduct, though tortious, is not in violation of 'the Law of Nations', as those words are used in 28 U.S.C. § 1350, unless the conduct is in violation of those standards, rules or customs affecting the relationship between states and between an individual and a foreign state, and used by those states for their common good and/or in dealings *inter se*.

Because the court dismissed the complaint for lack of jurisdiction, it did not reach defendant's alternative argument for dismissal based on *forum non conveniens*. Plaintiffs appealed to this Court.

ARGUMENT

I

OFFICIAL TORTURE VIOLATES THE LAW OF NATIONS

The district court dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country does not violate the law of nations as that term is used in 28 U.S.C. 1350. If Section 1350 reached only those practices that historically have been viewed as violations of international law, the court's decision would very likely be correct. Before the turn of the century and even after, it was generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But as we demonstrate below, Section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.

---

[2] "A." references are to the joint appendix.

A. *Section 1350 encompasses the law of nations as that body of law may evolve*

Section 1350 originated as Section 9 of the Judiciary Act of 1789 (1 Stat. 76 (1789)) and has not changed significantly since that time. It provides that:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This is one of several provisions in the Judicary Act "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.D. 398, 427 n. 25 (1964).

The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed.[3] Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789.

The Paquete Habana, 175 U.S. 677 (1900), illustrates this evolutionary process. There, the question was whether international law protected fishing ships from capture during times of war. Although a 1798 British

---

[3] Martime law has evolved significantly since 1789. See *Moragne* v. *State Marine Lines*, 398 U.S. 375 (1970) (overruling an 1886 decision and holding that maritime law affords a remedy for wrongful death on navigable waters).

case had held that the protection of such ships was a rule of comity only, the Court held that (*id.* at 694)—

> the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.

If the application of Section 1350 were limited to the subjects encompassed by the law of nations in 1789, leaving only the state courts competent to administer any rules of international law that might subsequently develop, the result would be to frustrate the statute's central concern for uniformity in this country's dealings with foreign nations. Accordingly, the district court's jurisdiction in this case turns not on whether the conduct alleged in the complaint would have been a violation of the law of nations in 1789, but on whether it is customarily treated as a violation of the law of nations today.

B. *International law now embraces the obligation of a state to respect the fundamental human rights of its citizens*

The view that a state's treatment of its own citizens is beyond the purview of international law was once widely held and is reflected in traditional works on the subject.[4] However, as we have stated, customary international law evolves with the changing customs and standards of behavior in the international community. Early in this century, as a consequence of those changing customs, an international law of human rights began to develop. This evolutionary process has produced wide recognition that certain fundamental human rights are

---

[4] *E.g.*, L. Oppenheim, *International Law: A Treatise*, Vol. 1, 362-369 (2d Ed. 1912).

now guaranteed to individuals as a matter of customary international law.

As we demonstrate in Part II, *infra*, this does not mean that all such rights may be judicially enforced. Indeed, it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government. But this distinction between judicially enforceable rights and rights enforceable only by the political branches should not obscure the central point we make here. The district court's assumption that a nation has no obligation under international law to respect the human rights of its citizens is fundamentally incorrect.

The sources of international law are international agreements, international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of learned commentators.[5] Developments in each of these areas have had a role in establishing the twentieth century international law of human rights.

The first significant treaty development was the Covenant of the League of Nations in 1919, which declared that the members of the League would attempt to secure and maintain fair and humane conditions of labor, and secure just treatment for the inhabitants of territory under their control.[6] Other early developments were the treaties entered into after World War I guaranteeing the

---

[5] Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (effective October 24, 1945). See also, *The Paquete Habana, supra*, 175 U.S. at 700.

[6] The Covenant of the League of Nations, Articles 22, 23, June 28, 1919, reprinted in *Treaties and Other International Agreements of the United States of America 1776-1949*, 2 Bevans 48, 55-57 (1969).

religious, cultural, and political rights of national minorities.[7]

Treaty activity accelerated after World War II. In 1945, the United Nations Charter imposed on U.N. members a general obligation to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[8] The U.N. Charter represents a clear break with the traditional view that a nation's treatment of its citizens is beyond the concern of international law—a break also evidenced by recognition in the Charter of the Organization of American States of "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."[9]

More recently, the obligation of states to respect fundamental human rights has been reiterated in a growing number of more specific multilateral treaties. These include The International Covenant on Civil and Political

---

[7] See, *e.g.*, Treaty Between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919, reprinted in *Treaties, Conventions, International Acts, Protocol and Agreements Between the United States of America and Other Powers 1910-1923*, 3 Malloy-Redmond 3714 (1923). In addition, the general treaties of peace concluding the war included provisions aimed at guaranteeing minority rights. See, *e.g.*, Treaty of Peace with Austria, Part 3, Sec. 5, signed at St. Germaine-en-Laye, September 10, 1919, reprinted in 3 Malloy-Redmond 3149.

[8] United Nations Charter, June 26, 1945, Arts. 55, 56, 59 Stat. 1031, 1045-1046, 3 Bevans 1153, 1166-1167 (1969).

[9] Charter of the Organization of American States, Articles 3(j), 16, 43(a) (entered into force December 13, 1951), as amended by the Protocol of Buenos Aires of 1967 (entered into force February 27, 1970), OAS Treaty Series No. 1-C, OAS, OR, OEA/Ser. A/2 (English), Rev. (1970), 21 U.S.T. 607, T.I.A.S. 6847. See also American Declaration of the Rights and Duties of Man, ch. 1 (1948), OAS, OR, OEA/Ser. L/V/E.23, Doc. 21, Rev. 2.

Rights,[10] The American Convention on Human Rights [11] and The European Convention for the Protection of Human Rights and Fundamental Freedoms.[12]

International custom also indicates that nations have accepted as law an obligation to observe fundamental human rights. In 1948, The United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights,[13] which goes beyond the UN Charter in specifying and defining the fundamental rights to which all individuals are entitled. The Universal Declaration has been followed by a growing number of U.N. resolutions clarifying and elaborating on these rights [14] or invoking them in specific cases.[15] In a parallel development, the International Conference on Security and Cooperation in Europe, which met in Helsinki and Geneva between 1973 and 1975, adopted a Final Act declaring that the participating nations would respect the human rights of their nationals.[16] The Final Act, like the UN resolutions, does not have the legal effect of a

---

[10] General Assembly Resolution 2200 (XXI)A (December 16, 1966), entered into force March 23, 1976; *Four Treaties Pertaining to Human Rights,* Message from the President of the United States, S. Doc. No. Exec. C, D, E, and F, 95th Cong., 2d Sess. (1978).

[11] Signed at San Jose, Costa Rica, November 22, 1969, entered into force July 18, 1978, OAS Treaty Series No. 36, OAS, OR, OEA/Ser.A/16 (English).

[12] Signed November 4, 1950, entered into force September 3, 1953, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

[13] General Assembly Resolution 217 (III)A (December 10, 1948).

[14] See Addendum.

[15] See *United Nations Action in the Field of Human Rights* (1974), ST/HR/2 (Pub. Sales No. E.74.XIV.2), at 14-15.

[16] *Conference on Security and Cooperation in Europe: Final Act* (Helsinki, 1975), 73 Dep't State Bull. 323, 325 (1975).

treaty but provides evidence of customary international law.[17]

General principles of law recognized by civilized nations also establish that there are certain fundamental human rights to which all individuals are entitled, regardless of nationality. Although specific practices differ widely among nations, all nations with organized legal systems recognize constraints on the power of the state to invade their citizens' human rights. In the period 1948-1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly borrowed from the Universal Declaration of Human Rights.[18] In the same period, the Declaration was referred to in at least 16 cases in domestic courts of various nations.[19]

The decisions of the International Court of Justice also reflect and confirm the existence of a customary international law of human rights.[20] And the affidavits of four

---

[17] As further evidence, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625(XXV) (October 24, 1970). The Declaration proclaims that:

> Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

It further states:

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law * * *.

[18] *United Nations Action in the Field of Human Rights, supra,* at 17-18.

[19] *United Nations Action in the Field of Human Rights, supra,* at 19.

[20] *Nuclear Tests* (*Australia* v. *France*), Judgment of December 20, 1974, [1974] I.C.J. 253, 303 (Opinion of Judge Petren); Advisory Opinion on *Legal Consequences for States of the Continued*

American experts in international law, filed by plaintiffs below, document the broad recognition among legal scholars that human rights obligations are now part of customary international law.[21]

In sum, as the Department of State said in a recent report to Congress on human rights practices:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. * * * There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.[22]

We recognize that a panel of this Court has said that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." *Dreyfus, supra,* 534 F.2d at 31. As we have shown, however, this statement is incorrect and should not be followed.[23]

Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

[21] See Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Myres S. MacDougal (A. 71); Affidavit of Richard Anderson Falk (A. 61-62).

[22] Department of State, *Country Reports on Human Rights Practices for 1979,* published as Joint Committee Print, House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. (February 4, 1980) Introduction at 1.

[23] *Dreyfus* mistakenly relied on Mr. Justice White's dissent in *Sabbatino* for its conclusion. At one point in his opinion Mr. Justice White does distinguish several cases decided long before the turn of the century as cases where violations of international law were not present because the parties were nationals of the acting state. 376 U.S. at 442, n. 2. However, Mr. Justice White makes clear elsewhere in his opinion that this is not the law today. In discussing a case in which an individual brought suit to recover property expropriated by the Nazis, Mr. Justice White specifically explained that "racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been con-

C. *Freedom from torture is among the fundamental human rights protected by international law*

Every multilateral treaty dealing generally with civil and political human rights proscribes torture. These include The American Convention on Human Rights,[24] The International Covenant on Civil and Political Rights[25] and The European Convention for the Protection of Human Rights and Fundamental Freedoms.[26] In addition, the Geneva Conventions of 1949 forbid torture in international or domestic conflicts and declare it to be a "grave breach" of the conventions.[27] This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law.[28]

---

demned in multinational agreements and declarations as crimes against humanity." *Id.* at 457 n. 18. Accordingly, Mr. Justice White concluded, "the acts could * * * be measured in local courts against widely held principle rather than judged by the parochial views of the forum." *Ibid.* Mr. Justice White's opinion thus reinforces our view that international law prohibits a nation from violating the fundamental human rights of its citizens.

[24] Article 5 provides in relevant part, that—"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." OAS Treaty Series No. 36, *supra*, at 2.

[25] Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." General Assembly Resolution 2200 (XXI) A, *supra*.

[26] Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

[27] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, Articles 3, 13, 129, 130.

[28] These treaty provisions, in conjunction with other evidence, are persuasive of the existence of an international norm that is binding as a matter of customary law on all nations, not merely those that are parties to the treaties. A. D'Amato, *The Concept of Custom in International Law* 103, 124-128 (1971).

The United States has signed both the American Convention on Human Rights and the International Covenant on Civil and Politi-

We do not suggest that every provision of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation's refusal to become a party, the near-unanimity required for the adoption of a rule into customary international law may be lacking.[29] No such disagreement has been expressed about the provisions forbidding torture.

A court also must distinguish between provisions that reflect principles that are considered desirable but incapable of immediate realization and those provisions that codify fundamental human rights. Illustrative of the former category are the declarations in the International Covenant on Economic, Social and Cultural Rights that individuals are entitled to favorable working conditions and to social security.[30] In proposing that the Senate ratify that treaty, the President observed:

---

cal Rights, and those instruments await the advice and consent of the Senate. See *Four Treaties Pertaining to Human Rights, supra.* Only European countries are entitled to be parties to the third treaty.

[29] For instance, Article 20 of the International Covenant on Civil and Political Rights prohibits "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence * * *." *Four Treaties Pertaining to Human Rights, supra,* at 29. This provision conflicts with principles of free speech that are central to the political values of many democracies. A number of nations, including the United Kingdom, Sweden, Denmark, Norway, and Finland, expressed reservations to Article 20 upon ratifying the Covenant. *Multilateral Treaties in Respect of Which the Secretary General Performs Depository Functions,* UN Doc. ST/LEG/Ser. D/12 108, 112, 114 (1978). President Carter has proposed a similar reservation in connection with United States ratification. *Four Treaties Pertaining to Human Rights, supra,* at XI-XII.

[30] International Covenant on Economic, Social, and Cultural Rights, Articles 7, 9. *Four Treaties Pertaining to Human Rights, supra,* at 15-16.

> Some of the standards established under these articles may not readily be translated into legally enforceable rights, while others are in accord with United States policy, but have not yet been fully achieved. It is accordingly important to make clear that these provisions are understood to be goals whose realization will be sought rather than obligations requiring immediate implementation.[31]

The President further recommended that the Senate express its understanding that these and like provisions "described goals to be achieved progressively rather than through immediate implementation." [32] The Covenant itself casts these principles in this light.[33] In contrast, because torture is universally condemned and incompatible with accepted concepts of human behavior, the protection against torture must be considered a fundamental human right.

International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.[34] That conduct evidences an aware-

---

[31] *Four Treaties Pertaining to Human Rights, supra*, at X.

[32] *Id.* at IX.

[33] International Covenant on Economic, Social, and Cultural Rights, Article 2(1), *Four Treaties Pertaining to Human Rights, supra*, at 14.

[34] See, *e.g.*, Affidavit of Richard Anderson Falk (A. 62); Affidavit of Thomas M. Franck (A. 64). In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted

ness that torture is universally condemned. This universal condemnation is made explicit in The Universal Declaration of Human Rights, which declares that "No one shall be subjected to torture * * *." [35] That principle has been reiterated in a number of unanimous UN resolutions, including the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Declaration on Torture").[36]

The UN Declaration on Torture not only confirms that international custom outlaws torture, but also supplies a precise definition of the conduct proscribed. The UN Declaration on Torture defines torture as—

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third per-

---

rough treatment short of torture. The Department's *Country Reports on Human Rights, supra,* reports no assertion by any nation that torture is justified.

[35] General Assembly Resolution 217(III)A (December 10, 1948), Art. 5.

[36] General Assembly Resolution 3452(XXX) (December 9, 1975). Article 2 of the Declaration provides:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3 provides:

> No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

> son information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[37]

This definition provides guidance to any court that may be required to determine whether particular conduct violates the proscription of torture in customary international law.

Analysis of general principles of law also discloses consistent condemnation of torture in national constitutions and legislation. Torture is specifically forbidden in the constitutions of over 40 nations.[38] The constitutions of over 15 additional nations contain implicit prohibitions against torture.[39] Eighteen states have incor-

---

[37] General Assembly Resolution 3452 (XXX) (December 9, 1975), Annex, Art. 1 (1). The United Nations Human Rights Commission is now drafting a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That draft Convention would require each party to make torture criminally punishable within its jurisdiction. It contains a very similar definition of torture (E/CN.4/1367, Annex at 1):

> For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[38] 48 Revue Internationale de Droit Penal Nos. 3 and 4, at 208 (1977). Paraguay is one such nation.

[39] *Id.* at 208-209.

porated the Universal Declaration of Human Rights in their constitutions and therefore have accepted the prohibition against torture contained in Article 5 of the Declaration.[40]

Condemnation of torture is reflected in both constitutional and statutory law in the United States. Conduct falling within the definition of torture in the UN Declaration on Torture would be a criminal offense under 18 U.S.C. 242 and civilly actionable under 42 U.S.C. 1983 or under the United States Constitution. Moreover, with certain exceptions, federal statutes bar assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights", specifically including "torture." [41] These statutes evidence the United States' acceptance of the international norm condemning torture and reflect the fact that the norm is certain enough to be cognizable by federal courts.

Finally, judicial decisions and the commentary of experts confirm that official torture violates international law. As shown in Part I-B, these authorities recognize the modern emergence of human rights norms in customary international law. Plaintiffs have submitted the affidavits of four American scholars confirming that the proscription of torture is such a norm.[42] And published commentary is to the same effect.[43] In these circumstances, the conclusion that international law prohibits torture is inescapable.

---

[40] *Id.* at 211.

[41] 22 U.S.C. 2304(a)(2), (d); 22 U.S.C. 2151.

[42] Affidavit of Richard Anderson Falk (A. 61-62); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Myres S. MacDougal (A. 71).

[43] O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 Am.J. Int'l L. 674, 687-688 (1977).

II

OFFICIAL TORTURE IS A TORT AND GIVES RISE TO A JUDICIALLY ENFORCEABLE REMEDY

Not every violation of international law is a tort within the meaning of Section 1350. However, some such violations are judicially cognizable as torts. A corollary to the traditional view that the law of nations dealt primarily with the relationship among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law. *Sabbatino*, *supra*, 376 U.S. at 422-423. Just as the traditional view no longer reflects the state of customary international law, neither does the latter doctrine.

Indeed, it has long been established that in certain situations, individuals may sue to enforce their rights under international law. For example, when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages. *The Paquete Habana*, *supra*. Similarly, when there has been an assault on a foreign ambassador in violation of international law, domestic courts may properly furnish a remedy. Cf. *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

The more recently evolved international law of human rights similarly endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. The highly respected Constitutional Court of Germany has recognized this right of individuals. The Court declared that, although "contemporary generally recognized principles of international law include only a few legal rules that directly create rights and duties of private individuals by virtue of the international law itself," an area in which they do create

such rights and duties is "the sphere of the minimum standard for the protection of human rights." [44]

As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. As the Supreme Court said in *The Paquete Habana*, *supra*, 175 U.S. at 700:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government. See *Sabbatino*, *supra*, 376 U.S. at 423, 430 n. 34.

This does not mean that Section 1350 appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations. Cf. *Sab-*

---

[44] *In Matter of the Republic of the Philippines*, 46 BVerfGE 342, 362 (2 BvM 1/76, December 13, 1977) (translated from the German by Stefan A. Riesenfeld); see also *Borovsky* v. *Commissioner of Immigration*, Judgment of September 28, 1951 (S.Ct. Philippines), summarized in [1951] United Nations Yearbook on Human Rights 287-288; *Chirskoff* v. *Commissioner of Immigration*, Judgment of October 26, 1951 (S.Ct. Philippines), summarized in *id.* at 288-289; *Judgment of Court of First Instance of Courtrai* (Belgium) of June 10, 1954, summarized in [1954] United Nations Yearbook on Human Rights 21 (courts relied on Universal Declaration of Human Rights in ordering release from detention).

batino, supra, 376 U.S. at 423. The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. *Sabbatino, supra*, 376 U.S. at 428, 430 n. 34. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights. As we have shown in Part I-C, official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate.[45]

From what we have said, it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law. On the other hand, as the Supreme Court stated in *Sabbatino, supra*, 376 U.S. at 428:

---

[45] There are few decisions which base judgments against torturers directly on customary international law. But this attests to the longstanding condemnation of torture under municipal law and the more recent evolution of international human rights law. Courts have, nonetheless, invoked customary international law along with municipal and treaty law in cases involving torture. *Ireland* v. *United Kingdom*, Judgment of January 18, 1978 (European Ct. of Human Rights) summarized in [1978] Y.B. Eur. Conv. on Human Rights 602 (Council of Europe) (UN Declaration of Torture relied on in interpreting the European Convention of Human Rights); *Auditeur Militaire* v. *Krumkamp*, Pasicrisie Belge, 1950.3.37 (February 8, 1950) (Belgian Counseil de guerre de Brabant), summarized in 46 Am.J. Int'l L. 162-163 (1952) (Article 5 of Universal Declaration of Human Rights, which prohibits torture and cruel treatment, cited as authority that under customary international law the defendant accused of war crimes was not free to use torture).

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

In this case, not only is there a consensus in the international community that official torture is unlawful, but Paraguay's Constitution expressly prohibits official torture[46] and Paraguayan law recognizes a tort action as an appropriate remedy.[47] The compatibility of international law and Paraguayan law significantly reduces the likelihood that court enforcement would cause undesirable consequences and is therefore an additional reason to permit private enforcement.

Because international law and Paraguayan law both prohibit torture, this Court need not decide whether considerations of comity or a proper construction of Section 1350 might require a different result if, despite the nearly universal condemnation implicit in the existence of a rule of customary international law, the jurisdiction with the most immediate interest in the controversy did not prohibit torture. Similarly, this case does not present any questions concerning whether international law, Paraguayan law or federal common law will govern other aspects of this lawsuit. The only question presented is whether official torture is a "tort * * * committed in violation of the law of nations * * *."[48] Because the

---

[46] Article 45 of the Paraguayan Constitution.

[47] A. 51-53, 80.

[48] Because the lower court dismissed for lack of jurisdiction, it did not decide whether the case should be dismissed on the ground of *forum non conveniens*. Although we agree with plaintiffs that this question should be addressed by the district court first, we

district court erred in concluding that it is not, its judgment should be reversed and the case remanded for further proceedings.[49]

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

ROBERTS B. OWEN
Legal Advisor

WILLIAM T. LAKE
Deputy Legal Advisor

STEFAN A. RIESENFELD
CHARLES RUNYON
LINDA A. BAUMANN
Attorneys
Department of State
Washington, D.C. 20520

DREW S. DAYS, III
Assistant Attorney General

JOHN E. HUERTA
Deputy Assistant Attorney General

/s/ Irving Gornstein
BRIAN K. LANDSBERG
IRVING GORNSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530

---

note that when the parties and the conduct alleged in the complaint have as little contact with the United States as they have here, abstention is generally appropriate. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). Plaintiffs assert that abstention is inappropriate because a tort suit in Paraguay would be a sham. For reasons of comity among nations, however, such an assertion should not be accepted absent a very clear and persuasive showing. In determining whether abstention is appropriate, the court should also consider the fact that the defendant has been deported. Compare *United States* v. *Castillo*, 615 F.2d 878, 882 (9th Cir. 1980).

[49] Defendant erroneously suggests (Br. 4-16) that Section 1350 is unconstitutional in conferring jurisdiction on federal courts to entertain tort actions under the law of nations. Customary international law is federal law, to be enunciated authoritatively by the federal courts. *Sabbatino,, supra*, 376 U.S. at 425; see *The Paquete Habana, supra*, 175 U.S. at 700. An action for tort under international law is therefore a case "arising under * * * the laws of the United States" within Article III of the Constitution. See Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 Yale L.J. 325, 331-336 (1964).

APPENDIX D

1937 League of Nations Convention for the Prevention and Punishment of Terrorism, Articles 1-5, opened for signature at Geneva on 16 November 1937.[1]

. . .

Being desirous of making more effective the prevention and punishment of terrorism of an international character,

. . .

Who, having communicated their full powers, which were found in good and due form, have agreed upon the following provisions:

Article 1.-1. The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.

2. In the present Convention, the expression "acts of terrorism" means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

Art. 2. Each of the High Contracting Parties shall, if this has not already been done, make the following acts committed on his own territory criminal offences if they

---

[1] Not entered into force; ratified by India on 1 January 1941; signed by: Albania, Argentine Republic, Belgium, India, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, Norway, Netherlands, Peru, Romania, Czechoslovakia, Turkey, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

are directed against another High Contracting Party and if they constitute acts of terrorism within the meaning of Article 1:

(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:

(a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;

(b) The wives or husbands of the above-mentioned persons;

(c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

Art. 3. Each of the High Contracting Parties shall make the following acts criminal offences when they are committed on his own territory with a view to an act of terrorism falling within Article 2 and directed against another High Contracting Party, whatever the country in which the act of terrorism is to be carried out:

(1) Conspiracy to commit any such act;

(2) Any incitement to any such act, if successful;

(3) Direct public incitement to any act mentioned under heads (1), (2) or (3) of Article 2, whether the incitement be successful or not;

(4) Wilful participation in any such act;

(5) Assistance, knowingly given, towards the commission of any such act.

Art. 4. Each of the offences mentioned in Article 3 shall be treated by the law as a distinct offence in all cases where this is necessary in order to prevent an offender escaping punishment.

Art. 5. Subject to any special provisions of national law for the protection of the persons mentioned under head (1) of Article 2, or of the property mentioned under head (2) of Article 2, each High Contracting Party shall provide the same punishment for the acts set out in Articles 2 and 3, whether they be directed against that or another High Contracting Party.

1970 Inter-American Juridical Committee (O.A.S.): Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Articles 1-2, 8-10

IN VIEW of the increasing frequency and seriousness with which acts of terrorism are occurring in this hemisphere, especially the kidnapping of persons for purposes of extortion; and

CONSIDERING:

That the General Assembly of the Organization, in Resolution 4 adopted at its first special session, held from June 25 through July 8, 1970, strongly condemned such acts and declared that they constitute serious common crimes characterized by flagrant violation of the most elemental principles of the security of the individual and community as well as offenses against the freedom and dignity of the individual; and

That it is advisable to establish general standards for international cooperation in the prevention and punishment of terrorism and especially of the kidnapping of persons, extortion, and other assaults against them, when such acts have international significance,

The governments of the member states of the Organization of American States

HAVE AGREED ON THE FOLLOWING:

Article 1. The contracting states undertake to cooperate mutually, by taking all the measures that they may consider effective, within their domestic legal systems, and particularly those that are set forth in this Convention, to prevent and apply punishment for acts of terrorism, especially the kidnapping of persons and extortion in connection with that crime, carried out within their respective territories, when such acts have international significance.

Article 2. (First Alternative). Kidnapping or any other offense against the life, the person, or the freedom of a foreign diplomatic or consular agent who enjoys inviolability under international law, or a member of the family of such a person protected by that prerogative, constitutes a common crime of international significance, whatever the motive for which it was committed.

Article 2. (Second Alternative). Kidnapping or any other offense against the life, the person, or the freedom of any person to whom the state has a duty to extend special protection in accordance with international law constitutes a common crime of international significance, whatever the motive for which it was committed.

* * * *

Article 8. In order to cooperate in the prevention and punishment of the acts of terrorism to which this Convention refers, the contracting states accept the following obligations:

a. To take all measures within their power to prevent the preparation of acts of terrorism that are intended to be executed in the territory of another contracting state;

b. To exchange information and to consider effective administrative measures in the matter of individual security;

c. To make provisions in their respective criminal laws regarding the criminal acts to which this Convention refers if those acts are not already covered therein;

d. To comply in the most expeditious manner with any request from another contracting state in regard to any of the criminal acts to which this Convention refers;

e. To provide for expeditious extradition procedures in their respective laws.

Article 9. Each contracting state may, in serious and exceptional circumstances, decide whether or not it would

be correct to authorize departure from its territory by, or to deport, as the case may be, any person who is detained or in prison, under the jurisdiction of that state.

The interested contracting states may reach an agreement, in cases of the specific type referred to in the preceding paragraph, regarding the legal status of the persons involved.

Article 10. This Convention shall remain open for signature by the member states of the Organization of American States, as well as by any other state that is a member of the United Nations, or any other state that may be invited to sign it by the General Assembly of the Organization of American States.

1970 O.A.S. Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Articles I, VIII.

I. Resolution 4 adopted by the General Assembly of the Organization of American States on June 30, 1970, during its First Special Session, Condemned "strongly, as crimes against humanity, acts of terrorism and especially the kidnapping of persons and extortion in connection with that crime."

* * * *

This accordingly preserves the spirit and letter of the General Assembly resolution of June 30, 1970, which states that: "The political and ideological pretexts utilized as justification for these crimes in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights."

The Inter-American Juridical Committee realizes that any other posture would be tantamount to leaving things as they are.

VIII. The situation contemplated by Article 3 covers acts of terrorism and particularly those of kidnapping of persons for purposes of extortion. Here the crime stems from violation of standards that are exclusively national but are, however, of concern to international law for other reasons. Terrorist acts always have been the target of public condemnation because of their utter inhumanity and irrationality. There is no end to what the authors expect to achieve as a result of the terror to which they resort, and they even go so far as to overlook the original motives. This, in turn, has an injurious effect on the peace and security of all the states.

This is why the sound arguments set forth by the Inter-American Juridical Committee in its 1959 Study on Political Offenses are more valid now than ever. It was stated at that time that terrorism is a crime of international law, unanimously condemned, even though it may pursue a political or social aim.

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RESOLUTION (74) 3 ON INTERNATIONAL TERRORISM

(Adopted by the Committee of Ministers on 24 January 1974 at its 53rd Session)

The Committee of Ministers,

Considering the recommendations of the Consultative Assembly on international terrorism and in particular Recommendation 703 (1973);

Aware of the growing concern caused by the multiplication of acts of international terrorism which jeopardise the safety of persons;

Desirous that effective measures be taken in order that the authors of such acts do not escape punishment;

Convinced that extradition is a particularly effective measure for achieving this result and that the political motive alleged by the authors of certain acts of terrorism should not have as a result that they are neither extradited nor punished,

Recommends that governments of member states be guided by the following principles:

1. When they receive a request for extradition concerning offences covered by the Conventions of The Hague for the suppression of unlawful seizure of aircraft and of Montreal for the suppression of unlawful acts against the safety of civil aviation, offences against diplomatic agents and other internationally protected persons, the taking of hostages or any terrorist act, they should, when applying international agreements or conventions on the subject, and especially the European Convention on Extradition, or when applying their domestic law, take into

consideration the particularly serious nature of these acts, inter alia:

—when they create a collective danger to human life, liberty or safety;

—when they affect innocent persons foreign to the motives behind them;

—when cruel or vicious means are used in the commission of those acts.

2. If it refuses extradition in a case of the kind mentioned above and if its jurisdiction rules permit, the government of the requested state should submit the case to its competent authorities for the purpose of prosecution. Those authorities should take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.

3. The governments of member states in which such jurisdiction is lacking should envisage the possibility of establishing it.

1976 European Convention on the Suppression of Terrorism, Preamble, Article I

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Aware of the growing concern caused by the increase in acts of terrorism;

Wishing to take effective measures to ensure that the perpetrators of such acts do not escape prosecution and punishment;

Convinced that extradition is a particularly effective measure for achieving this result,

Have agreed as follows:

Article I

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offense or as an offence inspired by political motives:

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

e. an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

1979 International Convention Against the Taking of Hostages, Preamble, Articles 1 & 2

The States Parties to this Convention

Having in mind the purpose and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,

Recognizing in particular that everyone has the right to life, liberty and security of person, as set out in the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights,

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as in other relevant resolutions of the General Assembly,

Considering that the taking of hostages is an offense of grave concern to the international community and that, in accordance with the provisions of this Convention, any person committing an act of hostage-taking shall either be prosecuted or extradited,

Being convinced that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism,

Have agreed as follows:

Article 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to

compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

(*a*) attempts to commit an act of hostage-taking, or

(*b*) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

Article 2

Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Articles 1-3

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

PART I

GENERAL PROVISIONS

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High

Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(*a*) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(*b*) taking of hostages;

(*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;

(*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-00563

No. 81-1870

HANOCH TEL-OREN, in his capacity as father,
on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Appellants

v.

LIBYAN ARAB REPUBLIC, *et al.*

And Consolidated Case No. 81-1871

Before: Edwards and Bork, Circuit Judges, and Robb, Senior Circuit Judge

ORDER

[Filed Mar. 19, 1984]

On consideration of the Petition for Rehearing of Appellants, filed March 5, 1984, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-00563

No. 81-1870

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Appellants

v.

LIBYAN ARAB REPUBLIC, *et al.*

And Consolidated Case No. 81-1871

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and Robb, Senior Circuit Judge

ORDER

[Filed Mar. 19, 1984]

The Suggestion for Rehearing *en banc* of Appellants, filed March 5, 1984, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam
For the Court:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2052

In The
Supreme Court of the United States
October Term, 1983

HANOCH TEL-OREN, in his capacity as father on behalf of the deceased, IMRY TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

HANOCH TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF ARAB AMERICANS

CHERIF SEDKY
KIRKPATRICK, LOCKHART, HILL,
CHRISTOPHER & PHILLIPS
1900 M Street, N.W.
Washington, D.C. 20036
(202) 452-7000

Attorney for Respondent National Association of Arab Americans

July 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the District Court erred in ruling that Plaintiffs' claims against the NAAA were insubstantial and unsubstantiated.

2. Whether the District Court erred in ruling that Plaintiffs claims were barred in their entirety by the statute of limitations.

3. Whether the District Court erred in ruling that Plaintiffs failed to establish jurisdiction under 28 U.S.C. § 1331.

4. Whether the District Court erred in ruling that Plaintiffs failed to establish jurisdiction under 28 U.S.C. § 1350.

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities ii

Statement of the Case 1

Argument 7

Conclusion 21

TABLE OF AUTHORITIES

CASES

Aktiebolaget Bofors v. United States, 90 App. D.C. 92, 194 F.2d 145 (1951) 8

Brandenburg v. Ohio, 395 U.S. 444 (1969) 12

Diggs v. Richardson, 180 App. D.C. 376, 555 F.2d 848 (1976) 15, 16, 18

Dreyfus v. von Finck, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) 15, 16

Erie R.R. v. Thompkins, 304 U.S. 64 (1938) 7

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 19, 20

Granville v. Hunt, 411 F.2d 9 (5th Cir. 1969) 10

Healy v. James, 408 U.S. 169 (1972) 13

Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) 10

Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) 16

TABLE OF AUTHORITIES—Continued

Pages

ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) 18

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) 15

Noto v. United States, 367 U.S. 290 (1961) 13

Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. *aff'd*, 278 F.2d 252 (D.C. Cir. 1958) 16

People of Saipan v. United States Department of Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) 17

Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) 14

Steorts v. American Airlines, Inc., 647 F.2d 194 (D.C. Cir. 1981) 7

The Paquete Habana, 175 U.S. 677 (1900) 6, 20

United States v. Postal, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) 16

Universal Airline v. Eastern Air Lines, 88 App. D.C. 219, 188 F.2d 993 (1951) 8

Yates v. United States, 354 U.S. 298 (1957) 13

STATUTES

28 U.S.C. § 1331 ..... 5, 14, 15, 18

28 U.S.C. § 1350 ..... 5, 17, 18, 19, 20

D.C. Code Ann. § 12-301 7

D.C. Code Ann. § 12-301(4) 7, 8, 9

D.C. Code Ann. § 12-301(8) 7

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Pages
Brierly, J., *The Law of Nations* (6th ed. 1963)	19
Henkin, L., Pugh, R., Schacter, O., & Smit, H., *International Law* (1980)	19

No. 83-2052

In The

Supreme Court of the United States

October Term, 1983

HANOCH TEL-OREN, in his capacity as father on behalf of the deceased, IMRY TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

HANOCH TEL-OREN, *et al.*,

Petitioners,

vs.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF ARAB AMERICANS

STATEMENT OF THE CASE

A. Material Facts

This case involves Plaintiffs' claims for damages arising out of an incident in the seemingly endless cycle of violence which has characterized the Israeli-Arab conflict since its inception. Plaintiffs allege that on March 11, 1978, 13 members of a faction of the Palestine Liberation

Organization ("PLO") engaged in a hostage-taking which was designed to gain the release of political prisoners in the custody of the Isaeli authorities. The tragic incident resulted in the death and wounding of a number of Israeli civilians. Plaintiffs seek redress in the federal courts of the United States for this particular paroxysm of Israeli/ Palestinian violence.

Plaintiffs did not allege direct involvement in the incident by the National Association Arab Americans ("NAAA"). Indeed, the record below made clear that NAAA condemned the incident. Motion to Dismiss the Complaint [hereinafter cited as "Motion"], Appendix to Brief in Opposition for Respondent National Association of Arab Americans [hereinafter cited as "Appendix II"] at 109. Instead, Plaintiffs alleged that the NAAA is legally responsible for the attack because it planned, conspired to commit, raised funds and procured arms, and "otherwise . . . acted in furtherance of this terrorist operation." Complaint at ¶61, Appendix IIA at 19-20. As the District Court found, Plaintiffs did not provide any factual basis for these broad and conclusory allegations. In its motion to dismiss the Complaint, therefore, the NAAA challenged Plaintiffs to demonstrate at least *some* factual basis for naming the NAAA as a defendant. Motion, App. IIB at 109, 137-39.

The NAAA had good reason to be surprised—indeed angered—at being named as a defendant in these actions and to demand a factual demonstration of the bases, if any, for Plaintiffs' action. The NAAA is a well-known and widely respected organization whose members are American citizens of Arab descent. Its primary purpose is to represent the two million American citizens of Arab

ancestry in matters relating to the United States' national and international interests and to fight institutionalized prejudice against Arab Americans. The NAAA has been warmly received by the American government. Indeed, it has received annual messages of appreciation and well-wishes from Presidents Ford, Carter, and Reagan.

On April 30, 1981, Plaintiffs responded to the NAAA's Motion. Consolidated Memorandum in Opposition to the Motion of NAAA to Dismiss the Complaints [hereinafter cited as "Response"], App. IIC, pp. 147 *et seq.* This Response confirmed the NAAA's conviction that Plaintiffs had no factual basis whatsoever to name the NAAA as a defendant. The Response specifically declined to substantiate its allegations, *id.* at 169, and merely repeated broad, conclusory and unsubstantiated allegations against the NAAA, *id.* at 166-67. Plaintiffs' Response undercut its own allegations against the NAAA by alleging that the bus attack was planned solely by the PLO and Libya, *id.* at 158, and by discussing the activity of the PLO and Libya at length with only marginal reference to the NAAA.

Instead of producing any factual support for the allegations in the Complaint, the Response disclosed that their "case" against the NAAA rested, in fact, on three alleged "facts" concerning Hisham Sharabi, a professor at Georgetown University and a past president of the NAAA. These "facts"—the *sole* basis for naming the NAAA as a defendant—are alleged to be as follows:

(1) The *Washington Post* on August 2, 1978—4½ months after the attack—reported that Professor Sharabi did not condemn *per se* the use of violence by the PLO in its struggle to regain a homeland for the Palestinian people. *Id.* at 160.

(2) Professor Sharabi is purported to have stated in an introduction to a book published in 1973 that "organized violence" and "armed struggle" were necessary parts of the Palestinian political struggle. Professor Sharabi is alleged to have made similar statements in a 1972 publiication. *Id.* at 165-66.

(3) Plaintiffs alleged that Professor Sharabi "was and remains a close personal friend of Yasar [sic] Arafat, leader of the PLO, and was and remains in close consultation with Arafat. Sharabi has actually been named as a possible member of a PLO government in exile." *Id.* at 160.

In short, the undisputed factual background presented to the District Court was clear: (1) there was no link between the NAAA and the March 11, 1978 bus incident; (2) Plaintiffs' subsequent pleadings before the District Court made clear that they had no basis whatsoever to support any of the allegations made against the NAAA in the Complaint; and (3) the sole basis for naming the NAAA as a defendant was the alleged political views and associations of Professor Sharabi.

B. The District Court's Decision

Judge Green ruled that there were three grounds for dismissal of the action. First, the claims against the NAAA (and against the Palestine Congress of North America (PCNA) and the Palestine Information Office (PIO)) were "clearly insubstantial," and that *these defendants "have not been connected to the claimed torts sufficiently to permit the action to proceed against them."* Appendix to Petition for Writ of Certiorari [hereinafter cited as "Appendix I"] at 124a, 125a (emphasis added).

Second, all of Plaintiffs' claims were barred by the one-year statute of limitations. *Id.* at 128a, 129a. Third, subject matter jurisdiction did not exist under either 28 U.S.C. §1331 (federal question) or §1350 (Alien Tort Statute) because the Plaintiffs failed to cite any statute, treaty, or other independent basis for a cause of action. *Id.* at 123a, 127a.

C. The Court of Appeals' Decision

The three judge panel for the District of Columbia Court of Appeals affirmed the dismissal in a *per curiam* opinion. App. IA at 2a, 3a. The opinion specifically referred to both the statute of limitations and the subject matter jurisdiction bases for the District Court's dismissal. *No part* of the District Court's holdings—including the dismissal of the actions as to the NAAA, the PCNA and the PLO on the grounds of the insufficiency of the allegations against them—was disturbed. The lengthy concurring opinions of Judges Edwards and Bork and the brief concurring opinion of Judge Robb each represent mere *dicta,* as none of the opinions represent the *court's* reasoning. The Petition so seriously mischaracterizes the opinions, however, that clarification is required.

Plaintiff's discussion of terrorism as a law of nations violation errs in two respects. First, it states that *both* Judges Edwards and Bork held that the instant alleged terrorism does not violate the law of nations. Petition at 7. While Judge Edwards did so state, Judge Bork did *not.* Judge Bork specifically declined to rule on whether the instant actions violated international law, declaring, "[t]here is, of course, no occasion here to state what international law should be." App. IA at 72a.

Second, Plaintiffs' Petition states that both Judges Bork and Edwards required "unanimity of international opinion" for a finding that terrorism violates international law. Petition at 7. Since Judge Bork did not reach the issue of what constitutes a violation of international law, neither did he reach the issue of degree of consensus required for a finding of a violation. To the extent that he discusses the issue, however, his comments make it clear that "unanimity" is not required; instead, dismissal was appropriate, in Judge Bork's view, because Plaintiffs claim "concerns areas of international law in which there is *litt'e or no consensus.*" App. I at 70a (emphasis added).

Judge Edwards also noted that the condemnation of terrorism is "not universal," as the Petition observed. Petition at 8. The immediately following sentence of Judge Edward's opinion, however, makes it clear that he also is *not* requiring unanimity: "Indeed, the nations of the world are *so divisely split* on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus." App. I at 46a (emphasis added). Judge Edwards merely followed the "general assent of civilized nations" standard which this Court enunciated in *The Paquete Habana,* 175 U.S. 677, 694 (1900).

Plaintiff's discussion of justiciability and the political question doctrine, Petition at 9, also misconstrues the nature of the concurring opinions. While Judge Robb's reliance on the doctrine is reasonably represented, Judge Bork's views are misrepresented. Judge Bork does discuss the doctrine and the possibility of determining the applicability of the doctrine to the instant case, but decides that "[s]uch a determination *is not necessary,*" App. IA at 62a (emphasis added), and appends that "[i]t is probably bet-

ter not to involve the political question doctrine in this case," *id.* at 63a n.8. Accordingly, the Plaintiff's Petition does not make it clear that only *one* judge (Judge Robb) relied on the political question doctrine in affirming the District Court's action.

ARGUMENT

The decisions of the District Court and the Court of Appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The courts below properly dismissed Plaintiffs' action in its entirety as being barred by the statute of limitations, and accordingly the petitioned issues need not be reached.

Under the principles of *Erie R.R. v. Thompkins,* 304 U.S. 64 (1938), the District Court looked to District of Columbia law to determine which statute of limitations to apply to Plaintiffs claims. *Steorts v. American Airlines, Inc.,* 647 F.2d 194 (D.C. Cir. 1981). The court ruled (and Plaintiffs never disagreed) that D.C. Code § 12-301 provides the applicable statute of limitations. App. IB at 127a, 128a. The only dispute was whether the Plaintiffs' claims were governed by the one-year limit which Section 12-301(4) provides for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment . . ." or by the three-year limit which Section 12-30-(8) provides for causes of action "for

which a limitation is not otherwise specially prescribed . . . ."

The Plaintiffs' Complaint asserted five causes of action against the Defendants. Count I asserted a cause of action based on "the *intentional* torts of assault, battery, false imprisonment, intentional infliction of mental distress and/or intentional infliction of cruel, inhuman and degrading treatment . . . ." Complaint at ¶72, App. IIA at 22 (emphasis added). Assault, battery, and false imprisonment are specifically limited to a one-year statute of limitations by § 12-301(4), so the first three parts of this Count are expressly barred.

The two remaining parts of Count I are similarly barred. The allegations of "intentional infliction of mental distress" and "intentional infliction of cruel, inhuman and degrading treatment" do not state separate or distinct rights of action. Instead, these "causes of action" clearly arise out of the same conduct which allegedly constitutes the assault, battery, and false imprisonment. Thus, in Count I, Plaintiffs have done no more than assign two additional labels to that conduct. Since "the label" which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states," *Aktiebolaget Bofors v. United States,* 194 F.2d 145, 148 (D.C. Cir. 1951), and "the statute of limitations . . . cannot be evaded by referring to [a] cause of action in some other terms," *Universal Airline v. Eastern Air Lines,* 188 F.2d at 393, 396 (D.D.C. 1951), the District Court ruled that all of Plaintiffs' Count I claim was time-barred. App. IB at 128a.

Similarly, Counts II through V of the Complaint are also barred by Section 12-301(4). In Counts II through

IV, Plaintiffs merely restate the substantive allegations of Count I and then supply yet another set of labels to those intentional tort claims. Count V, which also repeats the same Count I substantive allegations, purports to state a claim for conspiracy to commit the torts alleged in Counts I through IV. Complaint at ¶¶ 73-148, App. IIA at 22-37.

As noted above, a court must examine the *substance* of a party's claims to determine which statute of limitations to apply. The substance of the Count II through V claims is clearly identical to that of the claims in Count I —intentional torts. Like Count I, therefore, Counts II through V are subject to the one-year limitations period of D.C. Code § 12-301(4) and accordingly are time-barred. The words of the District Court in so ruling speak for themselves: "As to Counts II-V, alleging various torts claimed to be defined by international law, the same analysis would apply. Substantively, they are no different from the claims in Count I; they simply attempt to state a cause of action under different sources." App. IB at 129a.

As stated earlier, the *per curiam* opinion specifically referred to the statute of limitations issue in affirming the dismissal of the Complaint. The holding of the District Court regarding the statute of limitations bar was not disturbed in any way; none of the three concurring opinions reached the issue. Accordingly, it was the *undisturbed* holding of the District Court that Plaintiffs' Complaint was barred *in its entirety* by the statute of limitations.

The Plaintiffs have virtually conceded that their action is barred by the statute of limitations. While Plaintiffs appealed the statute of limitations ruling to the Court of Appeals, App. IIE at 300-307, the Petition contains not

a single mention of the statute of limitations. This omission, we submit, effectively concedes that dismissal of the Complaint as time-barred was correct, and compels this Court to affirm the judgments below without reaching the petitioned issues.

2. The courts below properly dismissed Plaintiffs' Complaint against the NAAA as being insubstantial and unsubstantiated, and accordingly the petitioned issues need not be reached insofar as they relate to the NAAA.

Plaintiffs' Complaint alleged both tortious conduct and conspiracy to commit torts on the part of the NAAA. Complaint at ¶¶ 63-148, App. IIA at 20-37. Since Plaintiffs never demonstrated direct NAAA involvement in the March 11 incident, conspiracy appears to be the heart of their case. Their conspiracy allegations against NAAA, however, are as deficient as their tortious conduct allegations. The law is clear that "it is not enough merely to state that a conspiracy has taken place." 2A Moore's Federal Practice ¶ 8.17[5], at 8-181 (2d ed. 1981). Rather, facts to support the conspiracy allegation must also be pleaded. *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy . . . without any supporting facts permits dismissal.") In *Granville v. Hunt,* 411 F.2d 9 (5th Cir. 1969), the court dismissed a conspiracy complaint much like Plaintiffs' herein, explaining:

> *The appellant has failed to allege any facts showing either the existence or the execution of the claimed conspiracy.* The pleadings contain only *bare allegations* that the defendants conspired against the appellant and that as a result of this conspiracy, he was subjected to cruel and unusual punishment. These

> allegations contain mere bare bones and are totally without any fleshing to show a link between the alleged conspirators. They also fail 'to allege any overt acts related to the promotion of the claimed conspiracy.' . . . *Such pleading is clearly insufficient.* 'Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in support of the claim. General allegations of this kind unsupported by any factual statements have generally been rejected as insufficient.' . . . '[T]he complaint must do more than merely state vague and conclusionary allegations respecting the existence [and operation] of a conspiracy.'

Id. at 11 (citations omitted, emphasis added, and bracketed language in original).

Plaintiff's allegations against the NAAA were virtually identical to the allegations made against two other defendants, the PIO and the PCNA. Complaint at ¶ 60-62, App. IIA at 19-20. These other defendants did not even exist at the time of the March 11, 1978 bus incident, making allegations against them absurd and enhancing the belief of the NAAA that Plaintiffs lack any factual basis for their allegations and that the Plaintiffs' true motivation was to hamper the NAAA in its representation of Arab Americans.

Based on the Plaintiffs' failure to substitute their allegations of tortious conduct or of conspiracy, the District Court ruled that the allegations "are clearly insubstantial." As noted, the District Court also ruled that the NAAA, PCNA, and PIO "have not been connected to the claimed torts sufficiently to permit the action to proceed against them." App. IB at 124a, 125a. The District Court's dismissal of the action was affirmed *per curiam* by the Court of Appeals for the District of Columbia Circuit, and none

of the three concurring opinions questioned or disagreed with the insufficiency holding. As was the case with respect to the statute of limitations issue, Plaintiffs have not challenged the insufficiency issue in their Petition. Accordingly, this Court should affirm the clearly correct holdings below and decline to hear the petitioned issues.

Insofar as this Court might wish to hear the petitioned issues as pertaining to other defendants, the NAAA suggests that certiorari be granted only with respect to those other defendants. No justification exists for causing the NAAA to argue nebulous issues of jurisdictional and constitutional law when it has no connection whatsoever to the alleged incident.

3. The NAAA may not be held liable for Professor Sharabi's statements and associations.

As discussed above, Plaintiffs made no allegations of direct NAAA involvement in the bus incident. Instead, the record below made clear that the *only* basis for Plaintiff's claims against NAAA were allegations concerning the political views and associations of Professor Hisham Sharabi. These views and associations may not be the basis for NAAA liability for four reasons.

First, Professor Sharabi's alleged advocacy of violence was far too remote to justify liability. His alleged statements were made six years *before* and four months *after* the bus attack. This Court on at least three occasions has declined to impose liability for statements more immediate than Professor Sharabi's statements. *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not

permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Noto v. United States,* 367 U.S. 290 (1961); *Yates v. United States,* 354 U.S. 298, 321 (1957) (". . . advocacy [of forcible overthrow, with the intent to accomplish such overthrow], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action . . . ."). Furthermore, Professor Sharabi's statements were made in a newspaper interview and in a scholarly journal. As such, they do not even remotely approach the kind of incitement for which the NAAA might conceivably be held liable.

Second, Plaintiffs' allegations mischaracterize Professor Sharabi's views. Plaintiffs' constant use of the emotionally charged word "genocide" obscures the fact that Professor Sharabi has not advoted removal of a *people* but of a *government*—the Zionist government. As was pointed out to the District Court, the full context of Professor Sharabi's statements demonstrates clearly that his goal is a joint democratic state allowing freedom for Jews, Muslims, and Christians alike. Reply Memorandum of NAAA in Support of Its Motion to Dismiss, App. IID at 222-26.

Third, Plaintiffs' suggestion that liability can be based solely upon the political or social views of persons with whom one associates is repugnant to basic First Amendment principles. The fact that Professor Sharabi allegedly associates with the PLO establishes no possible basis for civil liability. *See Healy v. James,* 408 U.S. 169, 185-86 (1972) (". . . it has been established that 'guilt by

association alone . . .' is an impermissible basis upon which to deny First Amendment rights," and ". . . the Court has consistently disapproved . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."); *Sawyer v. Sandstrom,* 615 F.2d 311, 317 (5th Cir. 1980) ("knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct").

Fourth, even if Professor Sharabi's statements were not protected for the reasons discussed above, those statements cannot be the basis for liability *of the NAAA.* Plaintiffs have not alleged any facts which indicate that Professor Sharabi was an agent or spokesman for the NAAA. Professor Sharabi's statements were just that—statements of an *individual*—and cannot justify liability of an organization with which he happens to be associated.

Accordingly, this Court should reject Plaintiffs' blatant attempt to bootstrap their baseless charges against the NAAA. The fact that certain NAAA members may have spoken out in favor of Palestinian self-determination is irrelevant to the liability issues of this case. The District Court and the Court of Appeals accordingly were correct in dismissing Plaintiffs' claims.

4. The courts below properly dismissed Plaintiffs' Complaint for lack of federal question jurisdiction.

One of Plaintiffs alleged sources of jurisdiction was 28 U.S.C. § 1331 which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

States." The District Court ruled that Section 1331 did not provide Plaintiffs with a basis for jurisdiction, App. I at 123a, and the Court of Appeals referred to the holding of no subject matter jurisdiction in its *per curiam* affirmance, App. I at 3a. Furthermore, the two concurring opinions which referred to Section 1331 also rejected it as a jurisdictional base. App. I at 13a n.4 (Judge Edwards), 57a (Judge Bork).

Plaintiffs originally alleged that their claims "arose under" federal common law, eight statutes, and thirteen treaties of the United States. App. IB at 117a, 118a, 122a. Having lost on all these contentions in both of the courts below, the Plaintiffs have abandoned most of their original claims and now only allege that five treaties of the United States furnish federal question jurisdiction. Petition at 27, 28. As the courts below ruled, however, none of these five treaties provide any judicially enforceable rights.

A treaty is a contract between the United States and the other signatories of the treaty, and generally does *not* confer any *privately* enforceable rights unless Congress implements the treaty through legislation. When Congress has not implemented such a treaty, the treaty is "executory." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Diggs v. Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976); *Dreyfus v. von Finck*, 535 F.2d 24, 29-30 (2d. Cir.), *cert. denied*, 429 U.S. 835 (1976).

While no precise rule determines whether a particular treaty is or is not executory, courts have relied primarily upon two factors. First, if a treaty calls for each country to enact legislation concerning the treaty,

it universaliy is held to be executory and thus no private rights are conferred by it. *United States v. Postal,* 589 F.2d 862, 876-77 (5th Cir.) *cert. denied,* 444 U.S. 832 (1979). Second, courts look to the words of a treaty to determine whether it evidences an intent to confer judicially enforceable rights upon individuals or whether it addresses governmental actions. *Diggs v. Richardson,* 555 F.2d 848 (D.C. Cir. 1976).

Based on these factors, all of the treaties now cited by Plaintiffs are executory and accordingly do not provide a private cause of action. Two of these treaties, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and the Geneva Convention Relative to the Treatment of Prisoners of War, expressly call for participating nations to enact implementing legislation. Motion, App. IIB at 123, 127. Additionally, one of these Geneva Conventions and the three other cited treaties have been judicially determined not to provide private rights of action. *Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978) (Geneva Convention for the Protection of Civilian Persons in Time of War); *Pauling v. McElroy,* 164 F.Supp. 390, 393 (D.D.C.) *aff'd,* 278 F.2d 252 (D.C. Cir. 1958) (United Nations Charter); *Dreyfus v. von Finck,* 534 F.2d at 30 (Hague Conventions of 1899 and 1907). Accordingly, the District Court and Court of Appeals were clearly correct in ruling that the treaties cited by Plaintiffs do not provide privately enforceable rights. App. IB at 119a-122a (District Court); App. IA at 75a-78a (Court of Appeals, Judge Bork concurring).

Plaintiffs attempt to create a conflict among courts when none exists. They assert that denial of their rights of action conflicted with decisions of the Ninth Circuit

and of this Court. Petition at 27-29. The decisions which Plaintiffs cite merely elucidate the test just described for determining whether or not a treaty is executory. For instance, the language of the Ninth Circuit relied upon by Plaintiffs states that the determination is made "in each case by reference to many contextual factors" including "the existence of domestic procedures and institutions appropriate for direct implementation." *People of Saipan v. United States Department of Interior,* 502 F.2d 90 (1974), *cert. denied,* 420 U.S. 1003 (1975); quoted at Petition, p. 29. This is exactly the point which the NAAA wishes to make: based on a contextual analysis, the courts below were clearly correct in ruling that the treaties cited by the instant Plaintiffs do not provide private rights of action.

5. The courts below properly dismissed Plaintiffs' Complaint for lack of jurisdiction under the Alien Tort Statute.

The Alien Tort Statute, 28 U.S.C. § 1350, provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The District Court concluded that Section 1350 did not confer jurisdiction over the Plaintiffs' claim because Plaintiffs failed to demonstrate that any provision of international law they relied upon provides a privately enforceable cause of action. Plaintiffs object to the District Court's interpretation of Section 1350, stating that an alien may bring an action in federal court for violation of international law even if that law is not judicially enforceable. Petition at 14. The NAAA submits that Plain-

tiffs' interpretation leads to a result that cannot have been intended.

If an *American citizen* sues in federal court for violation of the law of nations or treaty, he must demonstrate under Section 1331 that the provision of international law which is relied upon is judicially enforceable. This is a heavy burden since, as noted, the general rule is that treaties are executory and not judicially enforceable absent implementing legislation. *See Diggs v. Richardson,* 555 F.2d at 850-51. Under Plaintiffs' interpretation, however, Section 1350 permits *aliens* far greater access to federal courts than United States citizens. Indeed, aliens would be able to sue in federal court merely by alleging violation of an American treaty, regardless of whether that treatry provides any judicially enforceable rights. The District Court correctly rejected that result and provided the rational interpretation that international law must provide a judicially enforceable right before Section 1350 jurisdiction may be established. This is entirely consistent with the Section 1350 case law which emphasizes that Section 1350 must be narrowly construed. *See, e.g., ITT v. Vencap Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975).

Even if this Court were to disagree with District Court's interpretation of Section 1350, this Court would not need to hear the petitioned issues, for two reasons. First, the Petition obscures the fact that the District Court's interpretation of Section 1350 was *not* expressly adopted by the District of Columbia Court of Appeals. The opinion of the Court of Appeals merely "affirm[ed] the dismissal of this action" without any reference to Section 1350, App. I at 3a, and there had been two non-jurisdic-

tional reasons for dismissing the action against the NAAA —the statute of limitations and the lack of sufficiency of the allegations. Of the three concurring judges, only Judge Bork specifically agreed with the District Court's Section 1350 interpretation; Judge Edwards disagreed, App. IA at 8a-17a, and Judge Robb did not address the issue.

Second, even if the District Court's interpretation had been expressly adopted by the full panel of the Court of Appeals, the various conflicts among courts alleged by Plaintiffs would not exist. Plaintiffs claim that the decision below conflicts, *inter alia*, with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980). Petition at 13, 16. Such a claim ignores the fact that the tort in *Filartiga* was committed by a government agent, whereas the tort in the instant case was not. The general rule is that the law of nations only imposes duties on states and not on individuals, J. Brierly, *The Law of Nation* 1 (6th ed. 1963); L. Henkin, R. Pugh, O. Schacter & H. Smit, *International Law* 246-47 (1980). Such an assumption was implicit throughout the *Filartiga* decision, wherein the defendant had been Inspector General of Police. 630 F.2d at 878. The holding was that "torture perpetrated *under color of official authority* violates . . . international law," *id.* (emphasis added), and the opinion made constant references to "a state's power" and obligations owed by "governments," *id.* at 881, 885. Here, however, "[t]he Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law." App. IIA at 37a (Judge Edwards, concurring). *See also id.* at 68a (Judge Bork, concurring) ("[It] would appear the PLO is not a state."). Accordingly, under no circumstances can the ruling of

the Court of Appeals below be construed as conflicting with the Second Circuit's decision in *Filartiga*.

Plaintiffs also allege that the decisions below conflict with prior decision of this Court. They allege that the District of Columbia Court of Appeals "required unanimity of international opinion as a prerequisite to a finding that any act of a nation-state or its agent is in violation of international law," and that this supposed requirement conflicts with the "general assent" standard laid down by this Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900). Petition at 12-13, 19. Our earlier discussion clearly demonstrated, however that both of the judges discussing the issue followed this "general assent" standard, and, indeed, that it was the lack of *any* consensus which led Judge Edwards to state that the instant acts did not violate international law.

In summary, the District Court's interpretation of Section 1350 was merely a rational restriction on the rights of aliens to sue in federal courts. Only one of the three judges of the Court of Appeals expressly adopted the District Court's interpretation, but even if the entire appellate court had adopted the requirement, neither a conflict with other Courts of Appeals nor a conflict with this Court would be present. Hearing of the petitioned issue accordingly is not justified.

6. The political question issue which the Plaintiffs have petitioned is not properly a part of the controversy presented to this Court, and accordingly review by this Court is not appropriate.

Plaintiffs have alleged that they were denied redress because of the political question doctrine. Petition at 23. Such an allegation fundamentally distorts the decisions

below. The political question doctrine was not among the many factors cited by the District Court in dismissing Plaintiffs' action. The *per curiam* Court of Appeals decision made no reference to the doctrine. Only *one* of the three Circuit Court Judges based his concurring opinion on the political question doctrine. Plaintiffs were not "denied redress" because of the political question doctrine; they were denied redress because their claims were barred by the statute of limitations, because their claims against the NAAA were insubstantial, and because they failed to establish federal jurisdiction. The political question doctrine is simply not part of the controversy presented to this Court, and accordingly hearing of the petitioned issue is not appropriate or justified.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

CHERIF SEDKY*
KIRKPATRICK, LOCKHART, HILL, CHRISTOPHER & PHILLIPS

1900 M Street, N.W.
Washington, D.C. 20036
(202) 452-7000

Attorney for Respondent National Association of Arab Americans

July 1984

---

*Recognition and highest appreciation is extended to Carl Johnston, a law student at the University of Texas, for his exceptional contribution to this Brief.

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2052

In The
Supreme Court of the United States
October Term, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,

Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

HANOCH TEL-OREN, *et al.*,

Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Respondents.

APPENDIX TO BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF ARAB AMERICANS

CHERIF SEDKY
KIRKPATRICK, LOCKHART,
HILL, CHRISTOPHER & PHILLIPS
1900 M St., N.W.
Washington, D.C. 20036
(202) 452-7000

Attorney for Respondent National Association of Arab Americans

July 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

APPENDIX A—

Complaint of Hanoch Tel-Oren *et al.*, filed with the United States District Court for the District of Columbia. 1

APPENDIX B—

Motion of Defendant National Association of Arab Americans to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Expiration of the Limitations Period. 95

APPENDIX C—

Consolidated Memorandum of Points and Authorities Submitted by Plaintiff in Opposition to the Motion of National Association of Arab Americans to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Expiration of the Limitations Period. 147

APPENDIX D—

Reply Memorandum of Defendant National Association of Arab Americans in Support of Its Motion to Dismiss. 207

APPENDIX E—

Brief of Appellants Hanoch Tel-Oren, *et al.*, to the United States Court of Appeals for the District of Columbia Circuit. 241

APPENDIX F—

Brief of Appellee National Association of Arab Americans to the United States Court of Appeals for the District of Columbia Circuit. 308

APPENDIX A

Complaint of Hanoch Tel-Oren *et al.* filed with
United States District Court
for the
District of Columbia

[List of Parties Omitted]

COMPLAINT FOR THE INTENTIONAL TORTS OF ASSAULT, BATTERY, FALSE IMPRISONMENT, INFLICTION OF MENTAL DISTRESS, AND INFLICTION OF CRUEL, INHUMAN AND DEGRADING TREATMENT; TORTIOUS ACTIONS IN VIOLATION OF THE LAW OF NATIONS; TORTIOUS ACTIONS IN VIOLATION OF THE TREATIES OF THE UNITED STATES; TORTIOUS ACTIONS IN VIOLATION OF THE LAWS OF THE UNITED STATES; CONSPIRACY TO COMMIT INTENTIONAL TORTS; CONSPIRACY TO COMMIT TORTS IN VIOLATION OF THE LAW OF NATIONS; CONSPIRACY TO COMMIT TORTS IN VIOLATION OF THE TREATIES OF THE UNITED STATES; AND CONSPIRACY TO COMMIT TORTS IN VIOLATION OF THE LAWS OF THE UNITED STATES

COME NOW the several plaintiffs, many through guardians and next friends, and hereby allege against the defendants Libyan Arab Republic, Palestine Liberation Organization, Palestine Information Office, National Association of Arab Americans and Palestine Congress of North America as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the causes of action delineated herein pursuant to 28 U.S.C. Section 1331

(Federal question arising under the laws and treaties of the United States), 28 U.S.C. Section 1332 (Diversity of Citizenship), 28 U.S.C. Section 1350 (Alien's action for tort-providing (sic) for original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States) and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sections 1330, 1602-1611 (1976).

2. The District of Columbia is the proper venue in which to litigate the causes of action delineated herein. Acts in furtherance of the atrocities committed against the plaintiffs were perpetuated in the District of Columbia. Acts in furtherance of the conspiracies to commit atrocities against the plaintiffs, to violate the laws of the United States, to violate treaties of the United States and to violate the law of nations were performed in the District of Columbia. The District of Columbia is the seat of the foreign relations of the United States with foreign states, including the Libyan Arab Republic (hereinafter referred to as Libya). The District of Columbia is the center of the diplomatic activities of Libya with the United States. The District of Columbia is the center of the propoganda, (sic) lobbying and fund raising activities of Libya and the Palestine Liberation Organization (hereinafter referred to as the PLO) within the United States. Palestine Information Office, National Association of Arab Americans and Palestine Congress of North America have their headquarters in the District of Columbia, and their propaganda, lobbying and fund raising activities on behalf of Libya and the PLO are centered in the District of Columbia. Any federal district court is a proper venue in which to bring a claim arising pursuant to 28 U.S.C. Section 1350. The plaintiffs

have no other forum in which to receive redress of their grievances against the defendants.

3. The tortious acts committed against the plaintiffs are not of a political nature but instead are universally recognized as international crimes against mankind. Such acts are not within any protection given to sovereignty of a foreign state.

II. PLAINTIFFS

4. Hanoch Tel-Oren is a fifty-seven year old male, born in Pine Bluff, Arkansas, and is a citizen of the United States. He was the father of Imry Tel-Oren (age fifteen), who was killed in this incident. Prior to this incident, Hanoch Tel-Oren was a violinist with the Israeli Symphony Orchestra. Sharona Tel-Oren is a fifty year old female, born in Cleveland, Ohio, and is a citizen of the United States. She is the wife of Hanoch Tel-Oren. Prior to this incident, she was a flutist with the Israeli Symphony Orchestra. Adiel Tel-Oren is a twenty year old male, born in Israel, and is a citizen of the United States. Reviva Tel-Oren is a fifteen year old female, born in Israel, and is a citizen of the United States. Corenet Tel-Oren is a fifteen year old female, born in Israel, and is a citizen of the United States. Nir Tel-Oren is a twenty-three year old male, born in Israel, and is a citizen of the United States. Adiel, Reviva, Corenet and Nir Tel-Oren are the children of Hanoch and Sharona Tel-Oren. The remaining members of the family presently reside in Beersheba, Israel.

5. Joseph Hochman is a thirty-three year old male, born in Israel, and is a citizen of Israel. He was the husband of Rebecca Hochman (age twenty-eight), who was

killed in this incident. He was the father of Ilan Hochman (age three) and Roy Hochman (age seven), who were likewise killed in this incident. Prior to this incident, Joseph Hochman was employed as a bus driver with Egged Corporation. He presently resides in Neve-yam, Israel.

6. Monique Enekave is a thirty-nine year old female, born in Morocco, and is a citizen of Israel. She was the wife of Chaviv Enekave (age thirty-eight), who was killed in this incident, and the mother of Isaac Enekave (age ten) and Galit Enekave (age three) who were likewise killed in this incident. Tal Enekave is a ten year old female, born in Israel, and is a citizen of Israel. She is the daughter of Monique Enekave. Anat Enekave is a fourteen year old female, born in Israel, and is a citizen of Israel. She is the daughter of Monique Enekave. The remaining members of the family presently reside in Haifa, Israel.

7. Adina Haloune is a sixty-eight year old retired female, born in Syria, and is a citizen of Israel. She was the wife of Joseph Haloune (age sixty-eight), who was killed in this incident. Adina Haloune presently resides in Haifa, Israel.

8. Tamar Elefand is a thirty year old female, born in Poland, and is a citizen of Israel. She was the wife of Isaac Elefand (age forty-five), who was killed in this incident, and was the mother of Erez Elefand (age six), who was likewise killed in this incident. Prior to this incident, Tamar Elefand was employed as a nurse in hospital. Ronit Elefand is a six year old female, born in Israel, and is a citizen of Israel. She is the daughter of and the sole surviving child of Tamar Elefand. The re-

maining members of the family presently reside in Haifa, Israel.

9. Maya Susinsky Schur is a twenty-four year old married female, born in the Soviet Union, and is a citizen of Israel. She was the daughter of Joseph Susinsky (age fifty-seven) and Rena Katia Susinsky (age fifty), who were killed in this incident. Prior to the incident, Maya Susinsky Schur was employed as a secretary for an insurance company. She is presently residing in Bitsaron, Israel.

10. Moshe Alagim is a twenty-seven year old single male, born in Israel, and is a citizen of Israel. He is an architect and is presently residing in Tel Aviv.

11. Eliezer Kroytatro is a fifty-nine year old widower, born in Rumania, and is a citizen of Israel. He is a merchant and presently resides in Haifa, Israel.

12. Isaac Amir is a twenty year old married male, born in Morocco, and is a citizen of Israel. Prior to the incident, he was a police officer of lieutenant rank. Isaac Amir and his family (wife and three children) presently reside in Herzlia, Israel.

13. Ettei Sacherbrot is a sixty year old widowed female, born in Hungary, and is a citizen of Israel. She is a survivor of the Nazi concentration camps in Hungary. Ettel Sacherbrot presently resides in Haifa, Israel.

14. Isaac Mishkal is a thirty-three year old male, born in Israel, and is a citizen of Israel. Prior to this incident, he was employed as a bus driver with Egged Corporation. He was the father of Yoav Mishkal (age seven), who was killed in this incident. Rachel Mishkal

is a thirty year old female, born in Israel, and is a citizen of Israel. She is the wife of Isaac Mishkal. Prior to this incident, she was employed as a bank teller. Ruth Mishkal is a six year old female, born in Israel, and is a citizen of Israel. She is the daughter of, and the sole surviving child of Isaac and Ruth Mishkal. The remaining members of the family presently reside in Haifa, Israel

15. Joseph Hadany is a forty-one year old male, born in Israel, and is a citizen of Israel. He was the father of Naama Hadany (age five), who was killed in this incident. Prior to this incident, he was employed as a bus driver with Egged Corporation. Levana Hadany is a forty-two year old female, born in Israel, and is a citizen of Israel. She is the wife of Joseph Hadany. Prior to this incident, she was employed as a physical therapist. Ayelet Hadany is a twelve year old female, born in Israel, and is a citizen of Israel. She is the daughter of, and the sole surviving child of Joseph and Levana Hadany. The remaining members of the family presently reside in Haifa, Israel.

16. Simacha Gal-on is a thirty-seven year old male, born in Israel, and is a citizen of Israel. He was the father of Liat Gal-on (age seven), who was killed in the incident. Prior to this incident, he was employed as a bus driver with Egged Corporation. Shoshana Gal-on is a thirty-two year old female, born in Israel, and is a citizen of Israel. She is the wife of Simacha Gal-on. Idan Gal-on is a five year old male, born in Israel, and is a citizen of Israel. He is the son of, and was the sole surviving child of Simacha and Shoshana Gal-on. The remaining members of the family reside in Haifa, Israel.

17. Lily Glottman is a thirty-six year old female, born in Rumania, and is a citizen of Israel. She was the wife of Simon Glottman (age forty-three), who was killed in this incident. Prior to this incident, Lily Glottman was employed as a social worker. Anat Glottman is a seventeen year old female, born in Israel, and is a citizen of Israel. She is the daughter of Lily Glottman. Ilan Glottman is a fourteen year old male, born in Israel, and is a citizen of Israel. He is the son of Lily Glottman. The remaining members of the family reside in Haifa, Israel.

18. Mordechai Shefer is a seventy-two year old retired married male, born in Rumania, and is a citizen of Israel. He and his wife presently reside in Nahalria, Israel.

19. Tova Aharonovits is a forty-five year old married female, born in Lebanon, and is a citizen of Israel. She was the mother of Revital Aharonovits (age fourteen), who was killed in the incident and her only child. Tova Aharonovits and her husband presently reside in Haifa, Israel.

20. Carmela Rosner is a fifty-two year old female, born in Israel, and is a citizen of Israel. She was the wife of Tuvia Rosner (age fifty-four), who was killed in this incident. Prior to this incident, she was employed as a school teacher. Carmela Rosner presently resides in Haifa, Israel.

21. Gideon Haas is a thirty-six year old male, born in Israel, and is a citizen of Israel. Prior to this incident, he was employed as a bus driver with Egged Corporation. Miriam Haas is a thirty-four year old female, born in Israel, and is a citizen of Israel. She is the wife of Gideon

Haas. Michelle Haas is a twelve year old female, born in Israel, and is a citizen of Israel. She is the daughter of Gideon and Miriam Haas. Tal Haas is a six year old female, born in Israel, and is a citizen of Israel. She is the daughter of Gideon and Miriam Haas. The members of the family presently reside in Haifa, Israel.

22. Menashe Malca is a twenty-one year old male, born in Morocco, and is a citizen of Israel. Prior to this incident, he was employed as a computer operator. Eve Malca is a twenty-two year old female, born in Israel, and is a citizen of Israel. She is the wife of Menashe Malca. Menashe and Eve Malca presently reside in Haifa, Israel.

23. Abraham Shamir is a forty-one year old married male, born in Israel, and is a citizen of Israel. Prior to this incident, he was employed as a bus driver with Egged Corporation. Iris Shamir is a seventeen year old female, born in Israel, and is a citizen of Israel. Ayelet Shamir is a fourteen year old female, born in Israel, and is a citizen of Israel. Iris and Ayelet are the daughters of Abraham Shamir. Abraham Shamir and his two plaintiff daughters, together with his wife and another daughter, presently reside in Haifa, Israel.

24. Isaac Vachs is a twenty-five year old single male, born in Israel, and is a citizen of Israel. Prior to this incident, he was employed as a bill collector for a communications company. Isaac Vachs is presently residing in Haifa, Israel.

25. Nessa Schwarz is a fifty-nine year old widowed female, born in the Soviet Union, and is a citizen of Israel. Prior to this incident, she was self-employed as a merchant. Nessa Schwarz presently resides in Haifa, Israel.

26. Joseph Savechnik is a twenty-five year old male, born in the Soviet Union, and is a citizen of Israel. Prior to this incident, he was employed as an electrical technician. Ella Savechnik is a twenty-two year old female, born in the Soviet Union, and is a citizen of Israel. Ella Savechnik is the wife of Joseph Savechnik. Prior to this incident, she was employed as a shipyard worker. Joseph and Elba Savechnik presently reside in Acre, Israel.

27. Abraham Perets is a thirty-three year old married male, born in Bulgaria, and is a citizen of Israel. Prior to this incident, he was employed as a bus driver with Egged Corporation. Abraham Perets, together with his wife and two children, presently reside in Tel Aviv, Israel.

28. Shlomo Zait is a forty-five year old male, born in Israel, and is a citizen of Israel. He was the father of Mordecai Zait (age ten), who was killed in this incident. Prior to this incident, he was employed as a bus driver with Egged Corporation. Judith Zait is a forty-one year old female, born in Israel, and is a citizen of Israel. She is the wife of Shlomo Zait. Gabriel Zait is a fourteen year old male, born in Israel, and is a citizen of Israel. Yfaat Zait is a nine year old female, born in Israel, and is a citizen of Israel. Gabriel and Yfaat Zait are the children of Shlomo and Judith Zait. The remaining members of the family presently reside in Haifa, Israel.

29. Alexander Jaacobi is a sixty year old male, born in Rumania, and is a citizen of Israel. He is a dentist. Ella Jaacobi is a sixty year old female, and is a citizen of Israel. She is the wife of Alexander Jaacobi. Prior to this incident, she was employed as a dental assistant.

Oded Jaacobi, a minor, is the grandson of Alexander Jaacobi, and is a citizen of Israel. (Oded Jaacobi is bringing suit through his mother, Tirtza Jaacobi, as guardian and next friend). The members of the Jaacobi family presently reside in Haifa, Israel.

30. Ruth Drory is a thirty-three year old female, born in the Netherlands, and is a citizen of the Netherlands. She was the wife of Amnon Drory (age thirty-eight), who was killed in the incident. Prior to this incident, she was employed as a teacher. Michael Drory is an eleven year old male, born in Israel, and is a citizen of the Netherlands. Tamar Drory is a ten year old female, born in Israel, and is a citizen of the Netherlands. Ayelet Drory is an eight year old female, born in Israel, and is a citizen of the Netherlands. Michael, Tamar and Ayelet Drory are the children of Ruth Drory. The remaining members of the family presently reside in Haifa, Israel.

31. Uzy Aviasaf is a forty-seven year old male, born in Israel, and is a citizen of Israel. Prior to this incident, he was employed as a bus driver with Egged Corporation. Bruria Aviasaf is a forty-five year old female, born in Rumania, and is a citizen of Israel. Prior to this incident, she was employed as a secretary. She is the wife of Uzy Aviasaf. Michelle Aviasaf is a ten year old female, born in Israel, and is a citizen of Israel. Esther Aviasaf is a sixteen year old female, born in Israel, and is a citizen of Israel. Michelle and Esther Aviasaf are the daughters of Uzy and Bruria Aviasaf. The members of the family presently reside in Haifa, Israel.

32. Bilhah Sela is a forty-one year old married female, born in Bulgaria, and is a citizen of Israel. Prior to

this incident, she was employed as a nurse. She, together with her husband and two children, presently reside in Haifa, Israel.

33. Albert Ashkenazi is a seventy-six year old retired male, born in Bulgaria, and is a citizen of Israel. He was the husband of Mathilda Ashkenazi (age seventy), who was killed in the incident. Albert Ashkenazi presently resides in Haifa, Israel.

34. Yechiel Leibovici is a seventy-two year old retired male, born in Rumania, and is a citizen of Israel. He was the husband of Malca Leibovici (age sixty-eight), who was killed in this incident. Yechiel Leibovici presently resides in Tel Aviv, Israel.

III. DEFENDANTS

35. Libya is a foreign state with which the United States has diplomatic relations. Libya has an embassy at 1118 Twenty-Second Street, N.W., in the District of Columbia. Libya is a member of the United Nations and is a signatory of many of the treaties, covenants, accords, and conventions and has voted in favor of many of the resolutions which are pertinent herein. Libya conducts, funds and directs terrorism and other international criminal activity against civilian populations throughout the world. Libya has repeatedly conducted, funded, directed, ratified and been an accomplice in terrorism and other international criminal activity directed at the civilian population of Israel, at citizens of the United States, and at world civilian air traffic. Libya trains the terrorists and the terrorist instructors of the PLO, funds the PLO, plans the terrorist activities of the PLO and provides naval bases for the PLO in Libya.

36. The PLO is a terrorist organization whose professed purpose is to perpetuate terrorism in Israel and throughout the world. The PLO has engaged in repeated acts of terrorism and other international criminal activity against the civilian population of Israel, citizens of the United States, and world civilian air traffic. The PLO is composed of several groups, including the El Fatah.

37. The Palestine Information Office is the agent and instrumentality of and is legally synonymous with the PLO. The Palestine Information Office conducts propaganda, lobbying and fund-raising within the United States for Libya and the PLO. It has its headquarters at 1326 Eighteenth Street, N.W., in the District of Columbia. The Palestine Information Office engages in fund-raising within the United States to support the terrorist activities of the PLO and Libya, including the terrorist activity which is the subject of this complaint.

38. The National Association of Arab Americans (hereinafter referred to as NAAA) conducts propaganda, lobbying and fund-raising within the United States for Libya and the PLO. NAAA engages in fund-raising within the United States to support the terrorist activities of the PLO and Libya, including the terrorist activity which is the subject of this complaint. NAAA has its headquarters at 1825 Connecticut Avenue, N.W. in the District of Columbia.

39. The Palestine Congress of North America (hereinafter referred to as PCNA) conducts propaganda, lobbying and fund-raising within the United States of Libya and the PLO. PCNA engages in fund-raising within the United States to support the terrorist activities of the

PLO and Libya, including the terrorist activity which is the subject of this complaint. It has its headquarters in the District of Columbia.

IV. TORTIOUS AND CRIMINAL ACTIONS

40. On March 8, 1978, thirteen heavily armed terrorists, members of the El Fatah faction of the PLO, at the direction of the PLO, departed Lebanon by ship for Israel. The mission of these terrorists, as formulated by the PLO, was to capture and to hold as hostages Israeli civilian citizens to extort the release of PLO terrorists in Israeli jails. These terrorists were ordered to kill all the hostages if their mission at any stage did not proceed according to plan. The terrorists landed by boat in Israel on Saturday, March 11, 1978.

41. Upon landing in Israel, the terrorists encountered an unarmed American photographer named Gail Kaplan, whom they proceeded to kill without any justification or excuse.

42. The terrorists then proceeded to the main highway, which runs between Haifa and Tel Aviv. This highway was strictly a civilian corridor. There was no military traffic or legitimate military objective adjacent to the highway.

43. At the highway, the terrorists encountered a civilian, unarmed bus full of families of Egged cooperative members going to Haifa. The terrorists, without any justification or excuse, fired upon the bus, killing and wounding children as well as adults. The bus came to a halt.

44. During the same course of events, the terrorists stopped at gunpoint an unarmed civilian taxi cab, took the

passengers as hostages and then proceeded toward the halted bus.

45. The terrorists fired at the bus passengers who were giving aid to the wounded bus passengers outside the bus and also at the bus passengers who were trying to escape from the scene. The terrorists forced the passengers of the bus and the taxi cab onto the bus. The terrorists fired at passing unarmed civilian automobiles, killing and wounding children and adults. One automobile was stopped, a civilian was taken hostage and was forced onto the bus with the other civilian hostages.

46. The bus was then turned around toward Tel Aviv. The terrorists ordered the bus, together with the taxi cab, to proceed toward Tel Aviv. Terrorists sat on the roof of the taxi cab and shot at the passing cars. In so doing, they killed and injured more unarmed civilians, without any justification or excuse.

47. The PLO members terrorized, tortured, humiliated, assaulted, battered, murdered, injured, inflicted mental distress upon and otherwise subjected the men, women and children hostages in the bus to cruel, inhuman and degrading treatment.

48. Subsequently, the bus came upon a second Egged bus. The second bus was a regularly scheduled, unarmed civilian bus proceeding from Tel Aviv to Haifa. The terrorists shot at and stopped the second bus. They took the passengers of the second bus hostage and forced these hostages onto the first bus. During this process, they continued to shoot at passing civilian cars. The terrorists, with their civilian hostages, then continued toward Tel Aviv.

49. The terrorists tied all the men to the seats with their hands behind their backs. Some of the terrorists humiliated and tortured a sixteen year old boy attending military school in full view of all the hostages on the bus and then in cold blood, murdered him. Other terrorists were throwing hand grenades at passing civilian cars.

50. As before, the PLO members terrorized, tortured, humiliated, assaulted, battered, murdered, injured, inflicted mental distress upon and otherwise subjected the men, women and children hostages in the bus to cruel, inhuman and degrading treatment.

51. Becoming aware of the events described above, the police, using police vehicles as barricades, attempted to stop the bus. The terrorists proceeded through the barricade, shooting and throwing hand grenades at the police officers. Finally, the police officers shot at the wheels and engine of the bus, causing it to come to a stop. At this point, the terrorists began shooting at the hostages in the bus, as well as the police officers and civilians outside the bus. Men, women and children hostages in the bus were killed and injured from the terrorist shooting.

52. The terrorists forced an adult male, Chaviv Enekave, to go outside the bus and deliver an alleged negotiation message to the police officers. Just as Chaviv Enekave left the bus, the terrorists shot him in the back of the head and killed him. Two of his children, seeing their father murdered before their eyes, jumped up in anguish. The terrorists then shot and killed the children. At this time, the terrorists began again to throw hand grenades at the police officers and civilians outside the bus.

53. After the bus came to a halt, many of the hostages tried to escape. The terrorists shot at these hostages, killing and injuring many of them. The terrorists then began to throw hand grenades at the hostages in the back of the bus, killing and injuring still more hostages. The bus started to burn from the terrorist thrown hand grenades. The terrorist would not permit the hostages to leave the smoldering bus.

54. At this point, the terrorists departed the bus, leaving heavy explosives behind in the bus. As they departed the bus, the terrorists used a young female child as a shield. They then threw hand grenades into the bus, igniting the explosives. The bus exploded and burned, killing the remaining nineteen hostages, men tied to the seats, woman and children.

55. At no time did the terrorists encounter any forces of the Israeli mlitary.

56. As a result of the actions of terrorists, twenty-two adults and twelve children were killed, and sixty-three adults and fourteen children were seriously injured.

V. TORTIOUS AND CRIMINAL ACTIONS COMMITTED WITHIN THE UNITED STATES.

57. Acts in furtherance of the tortious and criminal conduct committed against the plaintiffs were performed by the defendants within the United States. The defandants conspired within the United States to commit the terrorist operation and similar terrorist operations. The defendants within the United States planned this terrorist operation and similar terrorist operations. The defendants procured funds from within the United States to support this terrorist operation and similar terrorist oper-

ations. The defendants within the United States procured arms to be used in this terrorist operation and similar operations. The defendants otherwise committed acts within the United States which were in support of and were an integral part of this terrorist operation and similar terrorist operations.

VI. RESPONSIBILITY OF THE DEFENDANTS

58. The PLO is directly responsible for all the tortious and criminal acts committed by the terrorists against the plaintiffs. At all times, the thirteen terrorists were acting as agents for the PLO and were acting within the scope of their employment with the PLO. The PLO recruited the thirteen terrorists specifically for this terrorist operation. The PLO trained the thirteen terrorists for several months specifically for this terrorist operation. The PLO gave the thirteen terrorists the orders pursuant to which they carried out the terrorist operation and committed the tortious and criminal acts against the plaintiffs. The PLO provided the arms, boats, hand grenades and other equipment for this terrorist operation. The PLO, subsequent to this terrorist operation, ratified this terrorist operation and claimed responsibility for this operation and for the tortious and criminal act committed in furtherance thereof. The PLO, together with the other defendants, planned this terrorist operation and the tortious and criminal acts committed against the plaintiffs; conspired to commit this terrorist operation and the tortious and criminal acts committed against the plaintiffs; raised funds to support this terrorist operation and the tortious and criminal acts committed against the plaintiffs; procured arms, boats, hand grenades and other equipment for this terrorist operation and the tortious and criminal acts

committed against the plaintiffs; and otherwise directed, participated in and acted in furtherance of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

59. Libya is directly responsible for all the tortious and criminal acts committed by the terrorists against the plaintiffs. At all times, the PLO and the thirteen terrorists were acting as agents of and were acting within the scope of their employment with Libya. Libya trained the instructors, who in turn trained the thirteen terrorists for this terrorist operation. The arms, boats, hand grenades and other equipment used in this terrorist operation were provided to the PLO by Libya. The mother ship, which had brought thirteen terrorists to the shore of Israel, immediately went to Libya and was given a hero's welcome by the Chief of Staff of the Libyan armed forces. Libya, subsequent to this terrorist operation, ratified the terrorist operation and claimed responsibility for the tortious and criminal acts committed in furtherance thereof. Libya, together with the other defendants, planned this terrorist operation and the tortious and criminal acts committed against the plaintiffs; conspired to commit this terrorist operation and the tortious and criminal acts committed against the plaintiffs; raised funds to support this terrorist operation and the tortious and criminal acts committed against the plaintiffs; procured arms, boats, hand grenades and other equipment for this terrorist operation and the tortious and criminal acts committed against the plaintiffs; and otherwise directed, participated in and acted in furtherance of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

60. The Palestine Information Office is directly responsible for all the tortious and criminal acts committed by the terrorists against the plaintiffs. The Palestine Information Office is an agent of and instrumentality of the PLO. The Palestine Information Office, together with the other defendants, planned this terrorist operation and the tortious and criminal acts committed against the plaintiffs; conspired to commit this terrorist operation and the tortious and criminal acts committed against the plaintiffs; raised funds to support this terrorist operation and the tortious and criminal acts committed against the plaintiffs; procured arms, boats, hand grenades and other equipment for this terrorist operation and the tortious and criminal acts committed against the plaintiffs; and otherwise directed, participated in and acted in furtherance of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

61. The NAAA is directly responsible for all the tortious and criminal acts committed by the terrorists against the plaintiffs. The NAAA, together with the other defendants, planned this terrorist operation and the tortious and criminal acts committed against the plaintiffs; conspired to commit this terrorist operation and the tortious and criminal acts committed against the plaintiffs; raised funds to support this terrorist operation and the tortious and criminal acts committed against the plaintiffs; procured arms, boats, hand genades and other equipment for this terrorist operation and the tortious and criminal acts committed against the plaintiffs; and otherwise directed, participated in and acted in further-

ance of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

62. The PCNA is directly responsible for all the tortious and criminal acts committed by the terrorists against the plaintiffs. The PCNA, together with the other defendants, planned this terrorist operation and the tortious and criminal acts committed against the plaintiffs; conspired to commit this terrorist operation and the tortious and criminal acts committed against the plaintiffs; raised funds to support this terrorist operation and the tortious and criminal acts committed against the plaintiffs; procured arms, boats, hand grenades and other equipment for this terrorist operation and the tortious and criminal acts committed against the plaintiffs; and otherwise directed, participated in and acted in furtherance of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

COUNT I

VII. ASSAULT, BATTERY, FALSE IMPRISONMENT, INTENTIONAL INFLICTION OF MENTAL DISTRESS AND INTENTIONAL INFLICTION OF CRUEL, INHUMAN AND DEGRADING TREATMENT

63. Paragraphs 1 through 62 are incorporated herein as if set out in their entirety.

64. The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment. At no time was there

justification or excuse for any of the tortious actions committed by the terrorists against the plaintiffs.

65. The defendats committed each of the above tortious actions with extreme malice and intent. It was the preplanned purpose and intent of the defendants to commit each of the above tortious actions in a manner so as to inflict the maximum harm upon the plaintiffs and with total disregard of the human rights and dignity of the plaintiffs.

66. In so doing the above tortious acts with said intent and malice, the defendants committed the intentional tort of assault against the plaintiffs.

67. In so doing the above tortious acts with said intent and malice, the defendants committed the intentional tort of battery against the plaintiffs.

68. In so doing the above tortious acts with said intent and malice, the defendants committed the intentional tort of false imprisonment against the plaintiffs.

69. In so doing the above tortious acts with said intent and malice, the defendants committed the intentional tort of infliction of mental distress against the plaintiffs.

70. In so doing the above tortious acts with said intent and malice, the defendants committed the intentional tort of infliction of cruel, inhuman and degrading treatment against the plaintiffs.

71. Having committed the above described tortious actions and the intentional torts of assault, battery, false imprisonment, intentional infliction of mental distress

and/or intentional infliction of cruel, inhuman and degrading treatment against the plaintiffs, the defendants, jointly and severally, are liable for the damages caused to the plaintiffs as a result of said tortious actions.

72. Having committed the above described tortious actions and the intentional torts of assault, battery, false imprisonment, intentional infliction of mental distress and/or intentional infliction of cruel, inhuman and degrading treatment, with said malice and intent, against the plaintiffs, the defendants, jointly and severally, are subject to punitive damages.

COUNT II

VIII. TORTIOUS ACTIONS IN VIOLATION OF THE LAW OF NATIONS

73. Paragraphs 1 through 72 are incorporated herein as if set out in their entirety.

74. The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment. At no time was there justification or excuse for any of the tortious actions committed by the terrorists against the plaintiffs.

75. The defendants committed each of the above tortious actions with extreme malice and intent. It was the preplanned purpose and intent of the defendants to commit each of the above tortious actions in a manner so as to inflict the maximum harm upon the plaintiffs and with total disregard of the human rights and dignity of the plaintiffs.

76. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the law of nations.

77. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Geneva Convention for the Protection of Civilian Persons in Time of War (August 12, 1949), including Articles 1, 2, 3, 27, 32, 34 and 147 of that Convention.

78. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of Protocols I and II to the Geneva Convention of 12 August 1949 (June 7, 1977), including the Preamble and Articles 8, 9, 10, 11, 16, 20, 35, 48, 50, 51, 52, 57, 58, 59, 61, 62, 67, 68, 76, 77, 78, 85, 87 and 91 of Protocol I; and the Preamble and Articles 1, 2, 4, 5, 7, 8, 9, 10 and 13 of Protocol II.

79. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Charter of the United Nations, including Articles 1 and 2 of that Charter.

80. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) (October 24, 1970).

81. In so doing the above tortious acts with said malice and intent, the defendants committed torts against

the plaintiffs in violation of the Universal Declaration of Human Rights, General Assembly Resolution 217(A) (III) (December 10, 1948), including the Preamble and Articles 1, 2, 3, 5, 6, 7, 8 and 9 of that Declaration.

82. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the International Covenant on Civil and Political Rights, General Assembly Resolution 2200(A) (XXI) (December 16, 1966), including the Preamble and Articles 2, 6, 7, 9 and 10 of that Covenant.

83. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Basic Principles for the Protection of Civilian Populations in Armed Conflicts, General Assembly Resolution 2675 (XXV) (December 9, 1970).

84. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land.

85. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Geneva Convention for the Prevention and Punishment of Terrorism (November 16, 1937), including Articles 1, 2, 3 and 10 of that Convention.

86. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Convention on the Pre-

vention and Punishment of the Crime of Genocide, General Assembly Resolution 260A (III) (December 9, 1948).

87. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) (1959).

88. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the American Convention of Human Rights, OAS Treaty Series No. 36 (signed on November 22, 1969).

89. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, including Articles 3, 13, 129 and 130 of that Convention.

90. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, General Assembly Resolution 3452 (XXX) (December 9, 1975).

91. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations pronounced in the United States proposed Draft Convention for the Prevention and Punishment of Certain

Acts of Terrorism (September 25, 1972), including the Preamble and Articles 1 and 10 of that Draft Convention.

92. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations pronounced in the European Convention on the Suppression of Terrorism (November, 1976).

93. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations against the taking of hostages pronounced in General Assembly Resolution 103 (XXXI) (January 21, 1977).

94. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations against committing terrorism on civilian populations pronounced in General Assembly Resolution 2444 (XXIII) (1968).

95. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Organization of American States: Convention to Prevent and Punish Acts of Terrorism (February 2, 1971).

96. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations pronounced in the Inter-American Judicial Committee (Organization of American States) Draft Convention Defining Torture as an International Crime

(February 6, 1980) and Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion (adopted September 26, 1970).

97. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations against the taking of hostages pronounced in the Federal Republic of Germany proposed draft of an International Convention Against the Taking of Hostages (December 4, 1979).

98. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations against terrorism directed at civilian populations pronounced in General Assembly Resolutions 3034 (XXVII) (December 18, 1972), 102 (XXXI) (December 15, 1976), 147 (XXXII) (December 16, 1977) and 145 (XXXIV) (January 22, 1980).

99. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations pronounced in the Conference on Security and Cooperation in Europe: Final Act (Helsinki Accord) (August 1, 1975).

100. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the League of Nations Counsel Resolutions on International Terrorism (December, 1934).

101. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of other conventions, covenants, treaties, accords and resolutions adopted and/or recognized as part of the law of nations within the meaning of 28 U.S.C. Section 1350.

102. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the principles of the law of nations accepted by International Custom, the Laws of Civil Nations and judicial decisions and the teachings of learned commentators.

103. Having so committed the above described tortious actions against the plaintiffs and having violated the law of nations in so doing, the defendants, jointly and severally, are liable for the damages caused to the plaintiffs as a result of said tortious actions.

104. Having so committed the above described tortious actions against the plaintiffs with said malice and intent and having violated the law of nations in so doing, the defendants, jointly and severally, are subject to punitive damages.

COUNT III

IX. TORTIOUS ACTIONS IN VIOLATION OF THE TREATIES OF THE UNITED STATES

105. Paragraphs 1 through 104 are incorporated herein as if set out in their entirety.

106. The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted

mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment. At no time was there justification or excuse for any of the tortious actions committed by the terrorists against the plaintiffs.

107. The defendants committed each of the above tortious actions with extreme malice and intent. It was the preplanned purpose and intent of the defendants to commit each of the above tortious actions in a manner so as to inflict the maximum harm upon the plaintiffs and with total disregard of the human rights and dignity of the plaintiffs.

108. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the treaties of the United States.

109. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Geneva Convention for the Protection of Civilian Persons in Time of War (August 12, 1949), including Articles 1, 2, 3, 27, 32, 34 and 147 of that Convention.

110. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of Protocols I and II to the Geneva Convention of 12 August 1949 (June 7, 1977), including the Preamble and Articles 8, 9, 10, 11, 16, 20, 35, 48, 50, 51, 52, 57, 58, 59, 61, 62, 67, 68, 76, 77, 78, 85, 87 and 91 of Protocol I; and the Preamble and Articles 1, 2, 4, 5, 7, 8, 9, 10 and 13 of Protocol II.

111. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Charter of the United Nations, including Articles 1 and 2 of that Charter.

112. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV) (October 24, 1970).

113. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Universal Declaration of Human Rights, General Assembly Resolution 217(A) (III) (December 10, 1948), including the Preamble and Articles 1, 2, 3, 5, 6, 7, 8 and 9 of that Declaration.

114. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the International Covenant on Civil and Political Rights, General Assembly Resolution 2200(A) (XXI) (December 16, 1966), including the Preamble and Articles 2, 6, 7, 9 and 10 of that Covenant.

115. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Basic Principles for the Protection of Civilian Populations in Armed Conflicts, General Assembly Resolution 2675 (XXV) (December 9, 1970).

116. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land.

117. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260A (III) (December 9, 1948).

118. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) (1959).

119. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the American Convention of Human Rights, OAS Treaty Series No. 36 (signed on November 22, 1969).

120. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, including Articles 3, 13, 129 and 130 of that Convention.

121. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of the Organization of American States: Convention to Prevent and Punish Acts of Terrorism (February 2, 1971).

122. In so doing the above tortious acts with said malice and intent, the defendants committed torts against the plaintiffs in violation of other treaties of the United States.

123. Having so committed the above described tortious actions against the plaintiffs and having violated the treaties of the United States in so doing, the defendants, jointly and severally, are liable for the damages caused to the plaintiffs as a result of said tortious actions.

124. Having so committed the above described tortious actions against the plaintiffs with said malice and intent and having violated the treaties of the United States in so doing, the defendants, jointly and severally, are subject to punitive damages.

COUNT IV

X. TORTIOUS ACTIONS IN VIOLATION OF THE LAWS OF THE UNITED STATES

125. Paragraphs 1 through 124 are incorporated herein as if set out in their entirety.

126. The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment. At no time was there justification or excuse for any of the tortious actions committed by the terrorists against the plaintiffs.

127. The defendants committed each of the above tortious actions with extreme malice and intent. It was the preplanned purpose and intent of the defendants to

commit each of the above tortious actions in a manner so as to inflict the maximum harm upon the plaintiffs and with total disregard of the human rights and dignity of the plaintiffs.

128. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of the laws of the United States.

129. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 956 (Conspiracy to injure property of foreign government).

130. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 957 (Possession of property in aid of foreign government).

131. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 960 (Expedition against friendly nation).

132. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 1651 (Piracy under law of nations).

133. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 1652 (Citizens as pirates).

134. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 1654 (Arming or serving of privateers).

135. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of 18 U.S.C. Section 1661 (Robbery ashore).

136. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in

violation of 18 U.S.C. Section 371 (Conspiracy to commit offense or to defraud the United States).

137. In so doing the above tortious acts with said malice and intent, in so furthering the commission of said tortious acts, and in so conspiring to commit said tortious acts and the acts in furtherance of said tortious acts, the defendants committed torts against the plaintiffs in violation of other laws of the United States.

138. Having so committed the above described tortious actions against the plaintiffs and having violated the laws of the United States in so doing, the defendants, jointly and severally, are liable for the damages caused to the plaintiffs as a result of said tortious actions.

139. Having committed the above described tortious actions against the plaintiffs with said malice and intent and having violated the laws of the United States in so doing, the defendants, jointly and severally, are subject to punitive damages.

COUNT V

XI. CONSPIRACY TO COMMIT INTENTIONAL TORTS; TORTS IN VIOLATION OF THE LAW OF NATIONS; TORTS IN VIOLATION OF TREATIES OF THE UNITED STATES; AND TORTS IN VIOLATION OF THE LAWS OF THE UNITED STATES

140. Paragraphs 1 through 139 are incorporated herein as if set out in their entirety.

141. The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plain-

tiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment. At no time was there justification or excuse for any of the tortious actions committed by the terrorists against the plaintiffs.

142. The defendants committed each of the above tortious actions with extreme malice and intent. It was the preplanned purpose and intent of the defendants to commit each of the above tortious actions in a manner so as to inflict the maximum harm upon the plaintiffs and with total disregard of the human rights and dignity of the plaintiffs.

143. The defendants, with said malice and intent, conspired within the United States and elsewhere to commit the intentional torts of assault, battery, false imprisonment, infliction of mental distress, and infliction of cruel, inhuman and degrading treatment against the plaintiffs.

144. The defendants, with said malice and intent, conspired within the United States and elsewhere to commit tortious acts in violation of the law of nations against the plaintiffs.

145. The defendants, with said malice and intent, conspired within the United States and elsewhere to commit tortious actions in violation of the treaties of the United States against the plaintiffs.

146. The defendants, with said malice and intent, conspired within the United States and elsewhere to commit tortious actions in violation of the laws of the United States against the plaintiffs.

147. Having so conspired to commit the above described tortious actions with said malice and intent against the plaintiffs, and the tortious actions having been committed against the plaintiffs, the defendants, jointly and severally, are liable for the damages caused to the plaintiffs as a result of said tortious actions.

148. Having so conspired to commit the above described tortious actions with said malice and intent against the plaintiffs, and the tortious actions having been committed against the plaintiffs, the defendants, jointly and severally, are subject to punitive damages.

XII. COMPENSATORY AND PUNITIVE DAMAGES

149. Paragraphs 1 through 148 are incorporated herein as if set out in their entirety.

150. As a direct and proximate result of the defendants' tortious actions, each of the plaintiffs has suffered and continues to suffer serious and irreparable damages.

151. Hanoch Tel-Oren was driving his car, in which his wife, three sons, and two daughters were passengers, on the Tel Aviv-Haifa Highway. The terrorists shot at his car and at the passengers therein. He sustained serious and permanent injury to his hands, chest and otherwise to his body as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for over two weeks. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining the permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his fifteen

year old son, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. His ability to earn a living has been substantially impaired. He lost both the joys previously associated with his now deceased young son. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Hanoch Tel-Oren, prays to this Court against the defendants, jointly and severally, for Ten Million Dollars ($10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

152. Sharona Tel-Oren was a passenger in her family car, driven by her husband, as the car proceeded on the Tel Aviv-Haifa Highway. The terrorists shot at the car and at the passengers therein. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her fifteen year old son, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has lost the joys previously associated with her now deceased young son. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plain-

tiff, Sharona Tel-Oren, prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

153. Adiel Tel-Oren was a passenger in the family car driven by his father. The terrorists shot at the car and at the passengers therein. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his brother, shot his father, and shot his older brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Adiel Tel-Oren, prays to this Court against the defendants, jointly and severally, for Four Milion Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

154. Reviva Tel-Oren was a passenger in the family car driven by her father. The terrorists shot at the car and at the passengers therein. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent

mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her brother, shot her father, and shot her older brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Reviva Tel-Oren through her guardian and next friend Hanoch Tel-Oren, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

155. Corenet Tel-Oren was a passenger in the family car driven by her father. The terrorists shot at the car and at the passengers therein. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her brother, shot her father, and shot her older brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plain-

tiff, Corenet Tel-Oren through her guardian and next friend Hanoch Tel-Oren, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

156. Nir Tel-Oren was a passenger in the family car driven by his father, as it was proceeding on the Tel Aviv-Haifa Highway. The terrorists shot at the car and at the passengers therein. He sustained serious and permanent injuries to his leg, as a result of being shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his brother, shot his father, and shot his younger brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Nir Tel-Oren, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

157. Joseph Hochman was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He suffered serious and permanent injuries to his leg and to his entire body from the effects of hand genades, including the implantment of shrapnel, and from being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, both of his legs have been amputated. As a direct result of the injuries received from the actions of the terrorists, he has sustained a one hundred percent disability; he has shrapnel implanted throughout his entire body; and he has been hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as his wife was shot by the terrorists and then burned to death in the smoldering bus. He sustained permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists killed his seven year old son and his three year old son, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife, his two sons, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the support, comfort, solace and companionship previously received from his now deceased wife. He has lost the joys previously

associated with his now deceased sons. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Joseph Hochman, prays to this Court against the defendants, jointly and severally, for Twenty-Four Million Dollars ($24,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

158. Monique Enekave was a passenger on the first bus and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her chin, head, chest and other parts of her body as the result of being repeatedly shot by the terrorists and otherwise. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her husband and two young children, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her two young daughters and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost

the support, comfort, solace, consortium and companionship previously received from her now deceased husband. She has lost the joys previously associated with her now deceased two young children. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff Monique Enekave prays to this Court against the defendants, jointly and severally, for Ten Million Dollars ($10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

159. Anat Enekave was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She suffered serious and permanent injuries to her body from the effects of hand grenades, including the implantment of shrapnel in her body. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her father and her two young siblings, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family and other hostages in the bus, sustaining

permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased father. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Anat Enekave through her guardian and next friend Monique Enekave, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

160. Tal Enekave was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her father and her two young siblings, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, com-

fort, solace and companionship previously received from her now deceased father. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Tal Enekave through her guardian and next friend Monique Enekave, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

161. Adina Haloune was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her shoulder and back, and otherwise to her body when she attempted to escape from the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as her husband, who was tied to the seat of the bus, burned to death when the bus exploded at the end of this incident. She sustained permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her husband and other hostages in the bus, sustaining

permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace, consortium and companionship previously received from her now deceased husband. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Adina Haloune, prays to this Court against the defendants, jointly and severally, for Three Million Dollars ($3,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

162. Tamar Elefand was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her stomach, and otherwise to her body, as a result of being repeatedly shot by the terrorists, and from the implantment of shrapnel throughout her body. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for over two months. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her husband and her six year old son, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as

the terrorists repeatedly physically and mentally abused her husband and her son, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace, consortium and companionship previously received from her now deceased husband. She has lost the joys previously associated with her now deceased young son. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Tamar Elefand, prays to this Court against the defendants, jointly and severally, for Twelve Million Dollars ($12,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

163. Ronit Elefand was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries throughout her body, as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, she has been hospitalized on more than five different occasions and is still receiving medical treatment today. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the ter-

rorists shot to death her father and brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her mother and father, her brother, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased father. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ronit Elefand through her guardian and next friend Tamar Elefand, prays to this Court against the defendants, jointly and severally, for Twelve Million Dollars ($12,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

164. Maya Susinsky Schur was driving her car on the Tel Aviv-Haifa Highway. Her mother and father were passengers in the car at the time. The terrorists shot and threw hand granades at her car. As a result therefrom, she sustained serious and permanent injuries to her head, and throughout her body. As a result therefrom, both her parents were killed. She sustained permanent mental, emotional and psychological injuries from this ordeal. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized

for substantial periods of time. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased parents. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Maya Susinsky Schur, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

165. Moshe Alagim was a passenger on the second bus, and was shot by the terrorists upon being transferred from the second bus to the first bus. As a result therefrom, he sustained serious and permanent injuries to his leg and otherwise to his body. As a direct result of the injuries received from the actions of the terrorists, he has been hospitalized for several months and has undergone several operations. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has been otherwise seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Moshe Alagim, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

166. Eliezer Kroytatro was a passenger in the initially seized taxi cab. He was held hostage from when the terrorists forced him on the first bus until the end of this incident. He sustained serious and permanent injuries to his leg and otherwise to his body, when he attempted to escape from the terrorists at the end of this incident. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for over one week. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Eliezer Kroytatro, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million

Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

167. Isaac Amir was a police officer who attempted to stop the bus by blockading its way to Tel Aviv. He sustained serious and permanent injuries to his legs and otherwise to his body as a result of being repeatedly shot by the terrorists and as a result of being struck by the oncoming bus. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for over forty-five days, and was bed-ridden for more than six months subsequent to this hospitalization and later underwent an operation with three more months of hospitalization. He was subjected to terror, assault, battery, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Isaac Amir, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

168. Ettel Sacherbrot was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her head,

chest, and throughout her body. She received second-degree burns all over her body. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ettel Sacherbrot, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

169. Isaac Mishkal was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his spine and other parts of his body from the effects of hand grenades, including the implantment of shrapnel and otherwise. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, in-

human and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He watched helplessly as his seven year old son burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife, his two young children, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the joys previously associated with his now deceased young son. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Isaac Mishkal, prays to this Court against the defendants, jointly and severally, for Ten Million Dollars ($10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

170. Rachel Mishkal was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her hand and otherwise to her body, as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and de-

grading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as her seven year old son burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She lost the joys previously associated with her now deceased young son. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Rachel Mishkal, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem apprpriate.

171. Ruth Mishkal was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her head and otherwise to her body from the effects of hand grenades, including the implantment of shrapnel. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and de-

grading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as her seven year old brother burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ruth Mishkal through her guardian and next friend Isaac Mishkal, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

172. Joseph Hadany was a passenger on the first bus. He sustained serious and permanent injuries to his head and otherwise to his body as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he underwent serious brain operations, was hospitalized in excess of one month and was a convalescent for over eighteen months. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He watched help-

lessly as the terrorists shot to death his five year old daughter while he was holding her in his arms, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. His ability to earn a living has been substantially impaired. He has lost the joys previously associated with his now deceased young daughter. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Joseph Hadany, prays to this Court against the defendants, jointly and severally, for Twelve Million Dollars ($12,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

173. Levana Hadany was a passenger on the first bus. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as the terrorists shot to death her five year old daughter, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has lost the joys previously associated with her now deceased young daughter. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Levana Hadany, prays to this Court against the de-

fendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

174. Ayelet Hadany was a passenger on the first bus. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as the terrorists shot to death her young sister, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ayelet Hadany through her guardian and next friend Joseph Hadany, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

175. Simacha Gal-on was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his stomach and otherwise to his body as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospital-

ized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He watched helplessly as his seven year old daughter was shot by the terrorists and then burned to death in the smouldering bus, sustaining permanent mental, emotion-and and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife, his daughter and son, and the other hostages in the bus, sustaining permanent mental, emotional and physical injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the joys previously associated with his now deceased young daughter. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Simacha Gal-on prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

176. Soshana Gal-on was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She suffered serious and permanent injuries to her body from the effects of hand grenades, including the implantment of shrapnel. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized

for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as her seven year old daughter was shot by the terrorists and then burned to death in the smoldering bus. She sustained permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her husband, her daughter and son, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the joys previously associated with her now deceased young daughter. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Shoshana Gal-on prays to this Court against the defendants, jointly and severally for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

177. Idan Gal-on was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He suffered serious and permanent injuries to his body. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent

mental, emotional and psychological injuries therefrom. He helplessly watched as his seven year old sister was shot by the terrorists and then burned to death in the smoldering bus. He sustained permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his mother and father, his sister, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Idan Gal-on through his guardian and next friend, Simacha Galon, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

178. Lily Glottman was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She suffered serious and permanent injuries to her ear, right hand, and otherwise to her body as a result of being repeatedly shot by the terrorists, and from the effects of hand grenades, including the implantment of shrapnel. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and

degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as her husband burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her husband, her daughter and son, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace, consortium and companionship previously received from her now deceased husband. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Lily Glottman, prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

179. Anat Glottman was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She suffered serious and permanent injuries to her knee and her legs and otherwise to her body from the effects of hand grenades, including the implantment of shrapnel and otherwise. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false im-

prisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as her father burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused her mother and father, her brother, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. She has lost the support, comfort, solace and companionship previously received from her now deceased father. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Anat Glottman through her guardian and next friend Lily Glottman, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

180. Ilan Glottman was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly

watched as his father burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his mother and father, his sister, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. He has lost the support, comfort, solace and companionship previously received from his now deceased father. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Ilan Glottman through his guardian and next friend Lily Glottman, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, pre-judgment interest, and such other relief as this Court may deem appropriate.

181. Mordechai Shefer was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his shoulder, and otherwise to his body, as a result of being repeatedly hot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and

psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Mordechai Shefer, prays to this Court against the defendants, jointly and severally, for Two Million Dollars ($2,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, pre-judgment interest, and such other relief as this Court may deem appropriate.

182. Tova Aharonovits was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained burns all over her body, suffering today from more than sixty-five percent total burn of her body, disfigurement and other serious and permanent physical and mental injuries therefrom. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for more than six months. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as her fourteen year old daughter was killed in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly

physically and mentally abused her daughter, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the joys previously associated with her now deceased young daughter. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Tova Aharonovits, prays to this Court against the defendants, jointly and severally, for Fourteen Million Dollars ($14,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

183. Carmela Rosner was a passenger in an automobile driven by her husband on the Haifa-Tel Aviv Highway. The terrorists shot at and threw hand grenades at their car. As a result thereof, her husband was killed. As a result thereof, she sustained serious and permanent injuries to her body, and was hospitalized for a substantial period of time. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot her husband to death, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace, consortium and companionship previously received from her now deceased hus-

band. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Carmela Rosner, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

184. Gideon Haas was the bus driver of the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his shoulder, chest, arms, legs and otherwise to his body, as a result of being repeatedly shot by the terrorists, and from the effects of hand grenades, including the implantment of shrapnel. He was hospitalized for over four months as a direct result of the injuries received from the actions of the terrorists, and is still receiving substantial treatment. He has sustained more than a forty-seven percent total disability. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused several members of his family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Gideon Haas, prays to this Court against the defendants, jointly and severally, for Sixteen Million Dollars ($16,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

185. Miriam Haas was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her face and otherwise to her body from the effects of hand grenades, including the implantment of shrapnel and otherwise. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly phsysically and mentally abused several members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Miriam Haas, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,-

000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

186. Michelle Haas was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused the various members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Michelle Haas through her guardian and next friend Gideon Haas, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,-000.00) in compensatory damages, Ten Million Dollars $10,000,000,00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

187. Tal Haas was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment

by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused the various members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Tal Haas through her guardian and next friend Gideon Haas, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.-00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

188. Menashe Malca was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his leg, hands and otherwise to his body, as a result of being repeatedly shot by the terrorists. As a result of the injuries received from the actions of the terrorists, he was hospitalized for months. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife and other hostages in the bus, sustaining permanent mental, emotional and

psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Menashe Malca, prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

189. Eve Malca was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused her husband and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Eve Malca, prays to this Court against the defendants, jointly and severally, for Three Million Dollars ($3,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

190. Abraham Shamir was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his arms, hands, neurological system, muscular system and otherwise to his body, as a result of the actions of the terrorists. He was shot and blinded in the right eye by the terrorists. He was repeatedly shot by the terrorists, and one such bullet remains in his left lung. As a direct result of the injuries caused him by the terrorists, he has been hospitalized for more than seven months, and is still receiving substantial treatment for those injuries. As a direct result of the injuries caused him by the terrorists, he has blood clots throughout his body. As a direct result of the injuries received from the actions of the terrorists, he has not less than seventy-seven percent disability. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot his fourteen and seventeen year old daughters, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his two young daughters, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparaby damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Abraham Shamir, prays to this Court against the defend-

ants, jointly and severally, for Eighteen Million Dollars $18,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

191. Iris Shamir was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her stomach, legs and otherwise to her body, as a result of being repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized in excess of three weeks. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as the terrorists shot her father and sister, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Iris Shamir through her guardian and next friend Abraham Shamir, prays to this Court against the defendants, jointly and severally, for Six Million Dollars

($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

192. Ayelet Shamir was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her shoulder, hand, legs, hips and otherwise to her body, as a result of being repeatedly shot by the terrorists and otherwise. As a direct result of the injuries received from the actions of the terrorists, her right leg is paralyzed, she walks with a limp and otherwise has limited locomotion. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as the terrorists shot her father and sister, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plain-

tiff, Ayelet Shamir through her guardian and next friend Abraham Shamir, prays to this Court against the defendants, jointly and severally, for Ten Million Dollars ($10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

193. Isaac Vachs was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his legs and otherwise to his body as a result of being repeatedly shot by the terrorists and otherwise. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Isaac Vachs, prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys'

fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

194. Nessa Schwarz was a passenger in a taxi cab and was held hostage from when the terrorists forcefully removed her from that cab and placed her on the first bus until the end of this incident. She sustained serious and permanent injuries to her back and otherwise to her body when she attempted to escape from the smoldering bus. She sustained serious burns to her body. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment and other cruel, inhuman and degrading treatment by the terrorists, sustaining mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused the other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Nessa Schwarz, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

195. Joseph Savechnik was a passenger on the second bus, and was held hostage from when the terrorists

seized that bus until the end of this incident. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot his wife, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Joseph Savechnik, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars $10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

196. Ella Savechnik was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her body as a result of being repeatedly shot by the terrorists, and from the smoke in the bus. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery,

false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused her husband and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ella Savechnik, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

197. Abraham Perets was the bus driver of the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his shoulder, ribs, legs, hand and otherwise to his body, as a result of being repeatedly shot by the terrorists and otherwise. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused other hostages in the bus, sustaining permanent

mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Abraham Perets, prays to this Court against the defendants, jointly and severally, for Ten Million Dollars $10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

198. Schlomo Zait was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his spine, legs, ears, shoulders and otherwise to his body, as a result of being repeatedly shot by the terrorists and from the effects of hand grenades, including the implantment of shrapnel. As a direct result of the injuries received from the actions of the terrorists, he has more than fifty percent disability. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He watched helplessly as his ten year old son burned to death in the smoldering bus, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terorists repeatedly physically and mentally abused the members of his family and other hostages

in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the joys previously associated with his now deceased young son. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Schlomo Zait, prays to this Court against the defendants, jointly and severally, for Sixteen Million Dollars ($16,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

199. Gabriel Zait was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his face and otherwise to his body, from the effects of hand grenades, including the implantment of shrapnel and otherwise. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched the terrorists shoot to death his brother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused the members

of his family and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Gabriel Zait through his guardian and next friend Shlomo Zait, prays to this Court against the defendants, jointly and severally, for Twelve Million Dollars ($12,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

200. Yfaat Zait was a passenger on the first bus. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Yfaat Zait through her guardian and next friend Shlomo Zait, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

201. Judith Zait was a passenger on the first bus. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Judith Zait, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

202. Alexander Jaacobi was driving his car, with his wife and grandson, along the Tel Aviv-Haifa Highway. The terrorists shot at the car and the persons therein. He stopped to help the wounded passengers of the first bus, and while treating them, he was repeatedly shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he developed a serious heart condition. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Alexander Jaacobi, prays to this Court against the defendants, jointly and severally, for Eight Million Dollars ($8,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

203. Ella Jaacobi was a passenger in her family car, driven by her husband, along the Tel Aviv-Haifa Highway. The terrorists shot at the car and the persons therein. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She watched helplessly as the terrorists shot her husband, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ella Jaacobi, prays to this Court against the defendants, jointly and severally, for Four Million Dollars ($4,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

204. Oded Jaacobi was a passenger in his family car, driven by his grandfather, along the Tel Aviv-Haifa Highway. The terrorists shot at the car and the persons

therein. He was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He watched helplessly as the terrorists shot his grandfather, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Oded Jaacobi through his guardian and next friend Tirtza Jaacobi, prays to this Court against the defendants, jointly and severally, for Three Million Dollars ($3,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

205. Ruth Drory was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She sustained serious and permanent injuries to her hand, shoulders, ear, and otherwise to her body from the effects of hand grenades, including the implantment of shrapnel and otherwise. As a direct result of injuries received from the actions of the terrorists, she can no longer use her right hand. As a direct result of the injuries received from the actions of the terrorists, she has more than fifty percent disability. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was sub-

jected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her husband, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace, consortium and companionship previously received from her now deceased husband. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ruth Drory, prays to this Court against the defendants, jointly and severally, for Sixteen Million Dollars ($16,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

206. Michael Drory was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his

father, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused the members of his family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the support, comfort, solace and companionship previously received from his now deceased father. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Michael Drory through his guardian and next friend Ruth Drory, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

207. Tamar Drory was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her father, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family, and other hostages in the bus, sustaining permanent mental, emo-

tional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased father. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Tamar Drory through her guardian next friend Ruth Drory, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

208. Ayelet Drory was a passenger on the first bus. She sustained serious and permanent injuries to her body from shrapnel and otherwise. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her father, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased father. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Ayelet Drory through her guardian and next friend Ruth Drory, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

209. Uzy Aviasaf was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists repeatedly physically and mentally abused the members of his family, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Uzy Aviasaf, prays to this Court against the defendants, jointly and severally, for Three Million Dollars ($3,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

210. Bruria Aviasaf was a passenger on the first bus. She sustained serious and permanent injuries to

her head, hands, and otherwise to her body from being repeatedly shot by the terrorists, and from shrapnel. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for over one week, sustained more than ten percent disability, and could not work for over six months. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Bruria Aviasaf, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

211. Michelle Aviasaf was a passenger on the first bus. She was subjected to terror, assault, battery and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Michelle Aviasaf through her guardian and next friend Uzy Aviasaf, prays to this Court against the de-

fendants, jointly and severally, for Two Million Dollars ($2,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

212. Esther Aviasaf was a passenger on the first bus, and was held hostage from when the terrorists seized that bus until the end of this incident. She was used as a human shield when the terrorists finally departed from the burning bus. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists repeatedly physically and mentally abused her father and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Esther Aviasaf through her guardian and next friend Uzy Aviasaf, prays to this Court against the defendants, jointly and severally, for Ten Million Dollars ($10,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudiment interest, and such other relief as this Court may deem appropriate.

213. Bilhah Sela was a passenger on the second bus, and was held hostage from when the terrorists seized that

bus until the end of this incident. She suffered serious and permanent injuries to her legs and otherwise to her body from the effects of hand grenades. As a direct result of the injuries received from the actions of the terrorists, she was hospitalized for substantial periods of time. She was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. She helplessly watched as the terrorists shot to death her mother, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. She helplessly watched as the terrorists repeatedly physically and mentally abused the members of her family and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. Her ability to earn a living has been substantially impaired. She has lost the support, comfort, solace and companionship previously received from her now deceased mother. She has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against her by the defendants, plaintiff, Bilhah Sela, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

214. Albert Ashkenazi was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sus-

tained serious and permanent injuries to his ears, head, hearing system, circulatory system, and otherwise to his body, as a result of the actions of the terrorists. As a direct result of the injuries received from the actions of the terrorists, part of his ear was burnt, part of his ear is missing, he has hearing loss, and he now suffers from a serious heart condition. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his wife, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused members of his family and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the support, comfort, solace, consortium and companionship previously received from his now deceased wife. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Albert Ashkenazi, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

215. Yechiel Leibovici was a passenger on the second bus, and was held hostage from when the terrorists seized that bus until the end of this incident. He sustained serious and permanent injuries to his body as a result of being shot by the terrorists. As a direct result of the injuries received from the actions of the terrorists, he was hospitalized for substantial periods of time. He was subjected to torture, terror, humiliation, assault, battery, false imprisonment, and other cruel, inhuman and degrading treatment by the terrorists, sustaining permanent mental, emotional and psychological injuries therefrom. He helplessly watched as the terrorists shot to death his wife, sustaining permanent mental, emotional and psychological injuries associated with such a horrible event. He helplessly watched as the terrorists repeatedly physically and mentally abused his wife, and other hostages in the bus, sustaining permanent mental, emotional and psychological injuries therefrom. His ability to earn a living has been substantially impaired. He has lost the support, comfort, solace, consortium and companionship previously received from his now deceased wife. He has otherwise been seriously and irreparably damaged.

WHEREFORE, as a consequence of the tortious actions committed against him by the defendants, plaintiff, Yechiel Leibovici, prays to this Court against the defendants, jointly and severally, for Six Million Dollars ($6,000,000.00) in compensatory damages, Ten Million Dollars ($10,000,000.00) in punitive damages, attorneys' fees and costs, prejudgment interest, and such other relief as this Court may deem appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL MATTERS PERMISSIBLE BY LAW.

Respectfully submitted,

PLAINTIFFS, BY COUNSEL

By: */s/* Michael S. Marcus

Oren R. Lewis, Jr., Esquire
Richard H. Jones, Esquire
Michael S. Marcus, Esquire
William E. Donnelly, Esquire
LEWIS, WILSON, LEWIS & JONES, LTD.
2054 North Fourteenth Street
Post Office Box 827
Arlington, Virginia 22216
(703) 527-8800

Joseph Livne, Esquire
16 Iben Sina Street
Haifa, Israel

COUNSEL FOR PLAINTIFFS

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN on Behalf of the Deceased Imry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

MOTION OF DEFENDANT NATIONAL ASSOCIATION OF ARAB AMERICANS TO DISMISS THE COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR EXPIRATION OF THE LIMITATIONS PERIOD

Pursuant to this Court's Order of April 1, 1981, Defendant National Association of Arab Americans, Inc. ("NAAA"), through counsel, hereby moves this Court to dismiss the Complaints in Civil Action Nos. 81-0563 and 81-0564 as to the NAAA on the grounds that (1) this Court lacks subject matter jurisdiction over these actions as against the NAAA, and (2) these actions are barred under the applicable statute of limitations.

The attached Memorandum of Points and Authorities is submitted in support of this Motion and alternative forms of orders are submitted herewith.

Pursuant to Local Rule 1-9(f), the NAAA hereby requests an oral hearing on this Motion.

Hill, Christopher and Phillips, P.C.

By /s/ Cherif Sedky
Lawrence Coe Lanpher
Karla J. Letsche

1900 M Street, N.W.
Washington, D. C. 200036
(202) 452-7000
Attorney for Defendant
National Association of Arab Americans, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN on Behalf of the Deceased Imry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF NATIONAL ASSOCIATION OF ARAB AMERICANS TO DISMISS THE COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR EXPIRATION OF THE LIMITATIONS PERIOD

Hill, Christopher and Phillips, P.C.

1900 M Street, N.W.
Washington, D.C. 20036
(202) 452-700

Counsel for Defendant
National Association of Arab
Americans, Inc.

Of Counsel:

Cherif Sedky
Lawrence Coe Lanpher
Karla J. Letsche

Dated: April 15, 1981
Washington, D. C.

TABLE OF CONTENTS

	Page
I. Background	2
II. This Court Lacks Subject Matter Jurisdiction the Claims Against the NAAA	5
A. This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. § 1331	5
1. Plaintiffs Have No Private Right of Action Under the Laws of the United States	7
(a) The Nature of Plaintiffs' Count IV Claims	8
(b) No Private Cause of Action for Civil Remedies Exists Under the Statutes Cited by Plaintiffs	9
2. Plaintiffs Have No Private Right of Action Under the Treaties of the United States	12
(a) The Defects in Plaintiffs' Count III Treaty Theory	12
(b) No Private Cause of Action Arises under the "Treaties" cited by Plaintiffs	15
B. This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. § 1330	20
C. This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. § 1332	20
D. 28 U.S.C. § 1350 Does Not Grant Subject Matter Jurisdiction Over Plaintiffs' Claims Against the NAAA	25
III. Plaintiffs' Claims are Barred by the Statute of Limitations	28
IV. Conclusion	33

TABLE OF CASES

Page

**Aktiebolaget Bofors v. U.S.*, 194 F.2d 145 (D.C. Cir. 1951) 30

Belle View Apartments v. Realty ReFund Trust, 602 F.2d 668 (4th Cir. 1979) 21

Blitz v. Boog, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964) 30

Burns v. Spiller, 4 F.R.D. 299 (D.D.C. 1945), *aff'd* 161 F.2d 377 (D.C. Cir.), *cert. denied*, 332 U.S. 792 (1947) 26

**Cameron v. Hodges*, 127 U.S. 322 (1888) 20

Cannon v. University of Chicago, 441 U.S. 677 (1979) 10

Chapalain Compagnie v. Standard Oil Co. (Indiana), 467 F. Supp. 181 (N.D. Ill. 1978) 6, 13

**Chicago & N.W. Ry. v. Ohle*, 117 U.S. 123 (1886) 24

City of Indianapolis v. Chase National Bank, 314 U.S. 63 (1941) 21

Compagnie Nationale Air France v. Castano, 358 F.2d 203 (1st Cir. 1966) 22

**Cort v. Ash*, 422 U.S. 66 (1975) 9, 11

Dassigienis v. Cosmos Carriers & Trading Corp., 442 F.2d 1016 (2d Cir. 1971) 21

Davison v. Seal-Skins, Fed. Case No. 3,661 (C.C.N.Y. 1835) 9

**Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976) 13-18

**Dreyfus v. Von Fink*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) 13, 16, 17

Ed and Fred, Inc. v. Puritan Marine Insurance Underwriters Corp., 506 F.2d 757 (5th Cir. 1975) 22

**Ex parte Edelstein*, 30 F.2d 636 (2d Cir.), *cert. denied*, 279 U.S. 851 (1929) 21, 22

Page

Erie Railroad Co. v. Thomkins, 304 U.S. 64 (1938) ... 28

Field v. Volkswagenwerk AG, 626 F.2d 293 (3d Cir. 1980) ... 21, 22

Fiorino v. Turner, 476 F. Supp. 962 (D. Mass. 1979) ... 9

Fosen v. United Technologies Corp., 484 F. Supp. 490 (S.D.N.Y. 1980) ... 21

Gilbert v. David, 235 U.S. 561 (1915) ... 24

**Gully v. First National Bank*, 299 U.S. 109 (1936) ... 6

Haggerty v. Pratt Institute, 372 F. Supp. 760 (E.D. N.Y. 1974) ... 24

Hendry v. U.S., 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd.*, 418 F.2d 774 (2d Cir. 1969) ... 30

Hernandez v. Lucas, 254 F. Supp. 901 (S.D. Tex. 1966) ... 23, 24

Hodge v. Southern Ry., 415 A.2d 543 (D.C. 1980) ... 28

Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954) ... 32

**Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) ... 15, 16

**IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) ... 22

Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968) ... 6

**Jones v. Rogers Memorial Hospital*, 442 F.2d 773 (D.C. Cir. 1971) ... 32

Johnson v. U.S., 547 F.2d 688 (D.C. Cir. 1976) ... 30

**Kaplan v. Manhattan Life Insurance Co.*, 109 F.2d 463 (D.C. Cir. 1939) ... 28

Kaufman and Broad, Inc. v. Gootrad, 397 F. Supp. 1054 (S.D.N.Y. 1975) ... 23, 24

Kimberly v. DeWitt, 606 P.2d 612 (Okla. Ct. App. 1980) ... 32

Page

Lavan Petroleum Co. v. Underwriters at Lloyds, 334 F. Supp. 1069 (S.D.N.Y. 1971) 21, 22

Lee v. Flintkote Company, 593 F.2d 1275 (D.C. Cir. 1979) 28

Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D. C. 1980) 19

Levy v. Baptist Hospital of Miami, Inc., 210 So.2d 730 Fla. Dist. Ct. App. 1968) 19

**Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) 13, 17

May Department Stores Co. v. Devercelli, 314 A.2d 767 (D.C. 1973) 28

**McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936) 20

Meyers v. Smith, 460 F. Supp. 621 (D.D.C. 1978) 23

Mohr v. Allen, 407 Supp. 483 (S.D.N.Y. 1976) 23

**Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807) 22

Nalle v. Oyster, 230 U.S. 165 (1913) 26

North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978) 6

Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958) *aff'd* 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) 16

**Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961) 24

People of Saipan v. United States Department of Interior, 502 F.2d 90 (9th Cir. 1974) (Trask, J., concurring), *cert. denied*, 420 U.S. 1003 (1975) 16

Piacquadio v. Beaver Valley Service Co., 355 Pa. 183, 49 A.2d 406 (1946) 32

Prescription Plan Service Corp. v. Franco, 552 F.2d 493 (2d Cir. 1977) 6

Page

Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980) 23

Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) 14, 15, 16

Semler v. Psychiatric Institute, 575 F.2d 922 (D.C. Cir. 1978) 32

Smith v. Carter, 545 F.2d 909 (5th Cir.), *cert. denied*, 431 U.S. 955 (1977) 23, 24

Stegner v. Fenton, 351 Pa. 292, 40 A.2d 473 (1945) 32

**Steorts v. American Airlines, Inc.*, No. 79-1215, (D.C. Cir., filed February 19, 1981) 28

**Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) 20

Strother v. District of Columbia, 372 A.2d 1291 (D.C. 1977) 32

Thomas v. Doyle, 187 F.2d 207 (D.C. Cir. 1950) 32

**Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) 15

**Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) 10

**United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) 13, 15, 17, 18, 19

**Universal Airline v. Eastern Air Lines*, 188 F.2d 993 (D.C. Cir. 1951) 30, 31

Universities Research Ass'n, Inc. v. Couter, 49 U.S. L.W. 4354 (U.S. April 6, 1981) 10

**Van der Schelling v. U.S. News & World Report, Inc.*, 213 F. Supp. 756 (E.D. Pa.), *aff'd per curiam*, 324 F.2d 956 (3d Cir. 1963), *cert. denied*, 377 U.S. 906 (1964) 24

Wharton v. Jones, 285 F. Supp. 634 (D.D.C. 1968) 32

Wigand v. Flo-Tek, Inc., 609 F.2d 1028 (2d Cir. 1979), *amended* (1980) 21

STATUTES

	Page
18 U.S.C. § 371	8, 9
18 U.S.C. § 610	9
18 U.S.C. § 956	8, 10, 11
18 U.S.C. § 957	8, 11
18 U.S.C. § 960	8, 10, 11
18 U.S.C. § 1651	8, 9, 11
18 U.S.C. § 1652	8, 9, 11
18 U.S.C. § 1654	8, 9, 11
18 U.S.C. § 1660	9
18 U.S.C. § 1661	8, 11
28 U.S.C. § 1330	1, 5, 19
28 U.S.C. § 1331	1, 5, 6, 8, 12, 13, 19, 27
28 U.S.C. § 1332	1, 5, 20, 22, 23, 24
28 U.S.C. § 1350	1, 5, 25-29
28 U.S.C. § 1602-11	1, 5, 19
D. C. Code § 12-101	31, 32
D. C. Code § 12-301(4)	28-31

INTERNATIONAL MATERIALS

	Page
American Convention of Human Rights, (November 22, 1969)	18
Basic Principles for the Protection of Civilian Populations in Armed Conflicts, U.N. General Assembly Resolution 2675 (XXV), (December 9, 1970)	17
Charter of the United Nations, (Signed June 26, 1945)	16

Page

Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States, U.N. General Assembly Resolution 2625 (XXV), (October 24, 1970) 16

Declaration of the Rights of the Child, U.N. General Assembly Resolution 1386 (XIV), (November 20, 1959) 18

Geneva Convention of August 12, 1949, Protocols I and II, (June 7, 1977) 15

Geneva Convention for the Protection of Civilian Persons in Time of War, (August 12, 1949) 15

Geneva Convention Relative to Treatment of Prisoners of War, (August 12, 1949) 18

The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, (July 29, 1899 and October 18, 1907) 17

International Covenant on Civil and Political Rights, U.N. General Assembly Resolution 2200 A (XXI), (December 16, 1966) 17

Organization of American States: Convention to Prevent and Punish Acts of Terrorism, (February 2, 1971) 19

Prevention and Punishment of the Crime of Genocide, U.N. General Assembly Resolution 260 (III), (December 9, 1948) 17

U.N. General Assembly Resolution 4387 18

Universal Declaration of Human Rights, U.N. General Assembly Resolution 217 A (III), (December 6, 1948) 16

MISCELLANEOUS AUTHORITIES

16 Am. Jur. 2d, Conspiracy, § 49 26

1 Moore's Federal Practices ¶ 0.62[2-2] (2d ed. 1980) 12

Page

1 Moore's Federal Practice ¶ 0.74[4] (2d ed. 1980) 24

Prosser, Handbook of the Law of Torts, § 47 (4th ed. 1971) 26

Rule 11, Fed. R. Civ. P. 27

Treaties Affairs Staff, Office of the Legal Adviser, Department of State, Treaties in Force (1979) 13

C. Wright, Handbook of the Law of Federal Courts, § 24 (2d ed. 1970) 21

C. Wright, Handbook of the Law of Federal Courts, § 25 (2d ed. 1970) 23

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN, on behalf of the deceased, Imry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF NATIONAL ASSOCIATION OF ARAB AMERICANS TO DISMISS THE COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR EXPIRATION OF THE LIMITATIONS PERIOD

This Memorandum is submitted in support of the Motion of the National Association of Arab Americans, Inc. ("NAAA") to Dismiss the Complaints, and is filed in accordance with this Court's Order of April 1, 1981.[1] There are two independent reasons for this Court to grant this Motion. First, the jurisdictional statutes relied upon by plaintiffs, 28 U.S.C. §§ 1330-32, 1350, 1602-11, do not provide subject matter jurisdiction over plaintiffs' claims against the NAAA. Second, plaintiffs' claims, all of which constitutite alleged intentional torts, are barred by the applicable one-year statute of limitations of D.C. Code § 12-301(4).

The detailed legal arguments which demonstrate that plaintiffs' Complaints must be dismissed are discussed in Sections II and III of this Memorandum. An understanding of the background to these cases is necessary to the disposition of the NAAA's Motion.

I. *Background.*

These cases concern the March 11, 1978 attack on a bus between Haifa and Tel Aviv in Israel. Plaintiffs or

---

[1] The NAAA is hereby filing a single Memorandum of Points and Authorities in support of its Motion to Dismiss each Complaint. Since each case involves the same legal issues, it was determined that a separate Motion and Memorandum was not required in each case. Duplicate originals of the Motion and Memorandum will be filed in Dockets 81-0563 and 81-0564.

persons represented by plaintiffs allegedly suffered severe injuries during that attack and have brought these damage actions for intentional torts against those entities allegedly responsible for that attack.

The NAAA was named as a defendant in both cases. However, plaintiffs do not allege that the NAAA actually participated in the March 11, 1978 attack. Indeed, plaintiffs allege that the attack was carried out by the El Fatah faction of the Palestine Liberation Organization ("PLO"), acting "*at the direction of the PLO.*"[2] Nevertheless, plaintiffs alleged that the NAAA, with the other defendants,

— planned the operation;

— conspired to commit the operation;

— raised funds to support the operation; and

— procured arms, boats, hand grenades and other equipment for the operation.

Based upon these alleged acts, plaintiffs assert that the NAAA is "directly responsible"[3] for the injuries they have suffered.

The NAAA completely denies plaintiffs' allegations.[4] The NAAA is a well known and widely respected organi-

---

[2] Complaint, Civil Action No. 81-0563, ¶ 32; Complaint, Civil Action No. 81-0564, ¶ 40.

[3] Complaint, Civil Action No. 81-0563, ¶ 53; Complaint, Civil Action No. 81-0564, ¶ 61.

[4] See Answer of NAAA, Civil Action No. 81-0563, filed March 24, 1981; Answer of NAAA, Civil Action No. 81-0564, filed March 24, 1981; Affidavit of Joseph D. Baroody, attached hereto as Exhibit 1.

zation whose members are American citizens of Arab descent. Its primary purpose is to represent the two million Arab Americans in matters relating to the United States' national and international interests and to fight institutionalized prejudice against Arab Americans. The NAAA has been warmly received by the American government. Indeed, it has received messages of appreciation and well-wishes from Presidents Ford and Carter every year since 1975, as documented in the attached Affidavit of Joseph D. Baroody (Exhibit 1), who was President of the NAAA when the March 11, 1978 incident occurred. For example, on April 12, 1976, President Ford wrote:

> Your organization has done much to enhance understanding and goodwill between the people of the U.S. and our friends in Arab nations. Such efforts help us greatly in attaining the final peaceful settlement in the Middle East to which our Government remains committed. I commend you in fostering ties that are essential to our common goal of peace, as a natural adjunct to our governmental efforts to forge mutually beneficial political and economic ties in that region.[5]

Two years later, President Carter wrote on March 8, 1978, just three days before the bus incident:

> I have great respect for your organization's important role in representing the values and political views of the large body of American citizens who share a common Arab heritage. Your leaders have met on numerous occasions with members of my staff, and I have had the opportunity to meet with your President, Joseph Baroody, and others at the White House. I commend your responsible efforts to ensure that the

---

[5] Affidavit of Joseph D. Baroody, Appendix B.

> views of Arab Americans are widely heard and properly understood.[6]

As Mr. Baroody states: "Surely, if the NAAA were even remotely affiliated with the kinds of activities alleged in the pending litigation, it could not possibly have had the warm reception it has enjoyed from the various instruments of government."[7]

The NAAA first learned of the March 11, 1978 incident through media reports which followed the event. Shortly thereafter, the NAAA condemned that attack as well as the subsequent Israeli invasion of Southern Lebanon which was undertaken in alleged retaliation for the bus attack. The NAAA stated:

> Terrorism must be condemned, whether it is conducted by resistance groups or by the forces of a sovereign state.[8]

In short, not only did the NAAA not plan, conspire, fund, or procure equipment for the March 11 attack, the NAAA has pointedly condemned that attack.

The Complaints in these cases do not contradict the NAAA's denial of involvement. Indeed, the Complaints never provide even a scintilla of evidence to suggest that the NAAA was, in fact, involved in the March 11 attack. Thus, in contrast to plaintiffs' vivid and detailed portrayal of the March 11 attack,[9] plaintiffs' description of

---

6 *Id.*, Appendix D.

7 *Id.* ¶ 6.

8 *Id.* ¶ 7, and Appendix G.

9 See Complaint, Civil Action No. 81-0563, ¶¶ 32-48; Complaint, Civil Action No. 81-0564, ¶¶ 4056.

the NAAA's alleged involvement consists of broad, generalized allegations, which are *word for word* identical to the allegations made against two other defendants, the Palestine Information Office and the Palestine Congress of North America.[10] It is a matter of public record, however, that these entities did not even exist at the time of the incident in question.[11] Thus, the broad allegations against these entities are clearly false. Similarly, the meaningless allegations against the NAAA do not, in fact, document any tortious conduct by the NAAA and, as demonstrated hereafter, compel dismissal of the Complaints.

II. *This Court Lacks Subject Matter Jurisdiction Over The Claims Against The NAAA.*

Plaintiffs allege that this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1330-32, 1350 and 1602-11. We demonstrate below, however, that *none* of these statutes grants jurisdiction over the claims against the NAAA.

— There is no Section 1331 jurisdiction because these cases do not arise under the laws or treaties of the United States and because the laws and treaties relied upon by plaintiffs provide no cause of action to plaintiffs;

---

10 *Compare* ¶¶ 52-54 in Complaint of Civil Action No. 81-0563; ¶¶ 60-62 in Complaint of Civil Action No. 81-0564.

11 The Palestine Congress of North America was incorporated in September, 1980. Formation of the organization was first considered at a "constitutional convention" held in August, 1979. The Palestine Information Office was organized on March 15, 1978.

— There is no jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11, because those statutes only provide jurisdiction over claims against a foreign state, not against the NAAA. Indeed, even against a foreign state such as Libya, these statutes provide no jurisdiction since the alleged tortious injury was suffered outside the United States;

— There is no Section 1332 jurisdiction because there is no diversity of citizenship; and

— There is no Section 1350 jurisdiction because all plaintiffs are not aliens as required by Section 1350 and because the NAAA is not even alleged to have committed a tortious act.

Accordingly, as regards the NAAA, this Court lacks subject matter jurisdiction and the Complaints must be dismissed.

A. *This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. § 1331.*

Plaintiffs have alleged that this Court has federal question jurisdiction under 28 U.S.C. § 1331. To sustain such jurisdiction, plaintiffs must demonstrate that their claims "arise under" the laws or treaties of the United States.[12] Plaintiffs cannot demonstrate the requisite nexus to United States laws or treaties and, accordingly, this Court lacks Section 1331 subject matter jurisdiction.

Claims do not "arise under" American laws or treaties merely by plaintiffs' reference in the Complaints to laws

---

[12] Counts III and IV of each Complaint, entitled respectively "Tortious Actions in Violation of the Treaties of the United States" and "Tortious Actions in Violation of the Laws of the United States," are based upon Section 1331 subject matter jurisdiction.

or treaties of the United States. *See Prescription Plan Service Corp. v. Franco,* 552 F.2d 493, 495 (2d Cir. 1977); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.,* 391 F.2d 486 (2d Cir. 1968). The *Ivy* court stated:

> [T]hat federal law furnishes a necessary ingredient of a claim is insufficient as a basis for federal jurisdiction, unless the claim presents an issue requiring construction of an Act of Congress or unless a distinctive policy of an Act of Congress requires that federal principles control the disposition of the claim.

Id. at 493. Similarly, a "court must ascertain from the complaint whether federal law is a *pivotal* issue in the case, one that is basic in the determination of the conflict between the parties." *North American Phillips Corp. v. Emery Air Freight Corp.,* 579 F.2d 229, 233 (2d Cir. 1978) emphasis supplied). *See also Gully v. First National Bank,* 299 U.S. 109, 117-18 (1936). In a recent case involving the disasterous oil spill off the French coast by the tanker *Amoco Cadiz,* the court articulated the "arising under" test in the following terms:

> A suit arises under the Constitution, laws or treaties of the United States where it *actually and substantially* involves a dispute or controversy concerning the validity or interpretation of such federal issues, the determination of which will have a *direct impact* on the plaintiff's success or failure.

Chapalain Compagnie v. Standard Oil Co. (Indiana), 467 F. Supp. 181, 184 (N.D. Ill. 1978) (emphasis supplied).

In the instant cases, no American law or treaty is a pivotal substantive issue, "the determination of which will have a direct impact on plaintiff's success or failure." Similarly, these cases do not require "construction of an

Act of Congress" and they involve no distinctive policy questions which require that federal principles control disposition of the claims. Rather, these cases involve straightforward allegations of intentional torts. This is plainly demonstrated by Count I of each Complaint in which plaintiffs allege such torts as assault, battery and false imprisonmment. The remaining Counts do not allege any different acts by defendants. Thus, plaintiffs' right to recover in these cases does not involve federal laws or treaties in any manner, much less the "pivotal," "substantial" and "direct" involvement required under applicable case law. Plaintiffs' right to recover rests on only one thing: factual support for the bald allegations in the Complaints that defendants did, in fact, commit the acts asserted. Thus, plaintiffs' extensive citation of federal laws and treaties cannot be used to create subject matter jurisdiction when the plain fact is that no federal claim is involved at all.

Although the foregoing constitutes a sufficient basis for rejection of Section 1331 jurisdiction, there is a further reason that such jurisdiction cannot be sustained: neither the treaties nor the laws cited by plaintiffs provides any basis for the private cause of action which plaintiffs attempt to assert. We address first the federal statutes relied upon by plaintiffs and then the treaties.

1. *Plainiffs Have No Private Right of Action Under the Laws of the United States.*

In Count IV of each Complaint, plaintiffs allege identical causes of action for violation of selected criminal laws of the United States. However, under settled legal principles, the alleged criminal violations do not provide

plaintiffs any implied private right of action for civil damages. Accordngly, without a civil remedy arising under federal law, Section 1331 jurisdiction cannot be sustained.

(a) *The Nature of Plaintiff's Count IV Claims.*

Plaintiffs' claims in Count IV fall into three classes. First, in three paragraphs,[13] plaintiffs allege violation of 18 U.S.C. §§ 956, 957, and 960, which pertain, respectively, to conspiracy to injure specific foreign government property, possession of papers or property to aid a foreign government in violating a United States penal statute, and participation in an expedition against a friendly nation.

Second, in four paragraphs,[14] plaintiffs allege acts of piracy in violation of 18 U.S.C. §§ 1651, 1652, 1654 and 1661. These statutes concern, respectively, piracy on the high seas, citizens of the United States committing piracy on the high seas, piratical acts by United States citizens against other United States citizens, and robbery ashore in connection with a piratical cruise or enterprise.

Finally, in a single paragraph of each Complaint,[15] plaintiffs allege violation of 18 U.S.C. § 371, the general criminal conspiracy statute.

We demonstrate below that plaintiffs have no implied private cause of action under these United States laws.

---

13 Paragraphs 122-124 of Civil Action No. 81-0563 and paragraphs 129-131 of Civil Action No. 81-0564.

14 Paragraphs 125-128 of Civil Action No. 81-0563 and paragraphs 132-135 of Civil Action No. 81-0564.

15 Paragraph 129 of Civil Action No. 81-0563 and paragraph 136 of Civil Action No. 81-0564.

First, however, we note several fundamental defects in plaintiffs' jurisdictional allegations. With respect to the allegations that defendants have acted illegally against a nation, the cited provisions of Title 18 require the following: a conspiracy to injure *specific* foreign government property (no such conspiracy against specific foreign government property is pleaded); or possession of property or papers intended to violate a U.S. statute (also not pleaded). Thus, even if there were a private cause of action under these statutes, plaintiffs' claims would not fall within it.

With respect to the piracy allegations, these are *per se* defective because piracy cannot exist when a person acts with authority of a sovereign state. *Davison v. Seal-Skins,* Fed. Case No. 3,661 (C.C.N.Y. 1835). Since plaintiffs allege the active participation of the State of Libya, no piracy under United States law can be shown. Further, the primary anti-piracy allegations require either an act of piracy on the high seas (18 U.S.C. §§ 1651, 1652) or robbery ashore (*Id.* § 1660). However, plaintiffs plead neither high seas piracy nor robbery.[16] Again, these allegations should be dismissed out of hand.

Finally, an implied private cause of action for conspiracy (*i.e.*, arising under 18 U.S.C. § 371) can exist only if there is a private cause of action arising under one of the other cited code provisions. *Fiorino v. Turner,* 476 F. Supp. 962 (D. Mass. 1979). Since plaintiffs have no pri-

---

[16] In addition, Sections 1652 and 1654 require the pirates to be citizens of the United States. No such allegation is, or could be, made in the Complaints.

vate cause of action under the other code provisions cited in Count IV, there similarly is no claim under Section 371.

(b) *No private Cause of Action for Civil Remedies Exist Under the Statutes Cited by Plaintiffs.*

The Supreme Court in recent years has set forth explicit guides by which lower courts may determine whether Congress intended to create an implied private right of action under federal law where none is specifically provided. The Court first articulated these tests in *Cort v. Ash,* 422 U.S. 66 (1975), which concerned whether a shareholder had a cause of action for a company's alleged violation of 18 U.S.C. § 610, a criminal statute prohibiting corporate political contributions. The four-part test for Congressional intent enunciated in *Cort v. Ash* is as follows:

— First, whether plaintiff is a member of a class for whose special benefit the federal statute was enacted;

— Second, whether there is any evidence of legislative intent, explicit or implicit, to create or deny a private remedy;

— Third, whether the underlying purposes of the statutory scheme are consistent with implying a remedy for the plaintiff; and

— Fourth, whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a federal cause of action.

422 U.S. at 78. In *Cort,* the Court declined to imply a private right of action, with the Court noting, in particular, the complete lack of indication in the statute that civil enforcement of any kind was intended by Congress.

The Supreme Court in other recent cases has emphasized that the first three *Cort* factors are the most important and that a cause of action may not be implied if the plaintiff is not a member of the protected class and if there is no evidence of a Congressional intention to create a private right of action. *See Universities Research Ass'n, Inc. v. Couter,* 49 U.S.L.W. 4354 (U.S. April 6, 1981); *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979); *Cannon v. University of Chicago,* 441 U.S. 677 (1979). Indeed, the Supreme Court has made clear in these recent decisions that courts must be extremely cautious in employing a private cause of action under federal law where Congress has failed to provide expressly for such private relief.

In the instant case, the *Cort v. Ash* criteria lead inescapably to the conclusion that *no* private action exists in plaintiffs' favor. First, with respect to 18 U.S.C. §§ 956 and 960, the clear purpose of the statutes is to avoid injury to a foreign government, through attack on its property or otherwise, and thus to protect American foreign policy interests. Plaintiffs, who are private citizens residing abroad, clearly do not fall within any special class of persons whom these statutes were designed to protect. Second, there is not the slightest indication of a Congressional intention to imply a private cause of action. As stated in *Cort v. Ash,* there is "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80. Third, private enforcement will not serve the underlying purposes of the criminal statutes. These statutes involve foreign policy concerns where private in-

tervention could, in fact, be adverse to American governmental interests. In short, there is *no* possible basis to infer a private cause of action under Sections 956 and 960.

Section 957 merits a slightly different inquiry but the same result. The statute clearly is designed to protect the U.S. government and its laws, as it prohibits any person from aiding a foreign government to violate U.S. laws. There is no basis for believing that plaintiffs constitute a class of persons that Section 957 was designed to protect. Further, there again is no indication in the statute that a private cause of action was to be inferred. Finally, a private cause of action could not assist in enforcement of Congressional purposes. Since the statute is designed to protect the American government, government enforcement clearly suffices.

Finally, the piracy statutes (18 U.S.C. §§ 1651-52, 1654, 1661) also do not provide plaintiffs a private cause of action. The clear purpose of the statutes is to protect commerce and life on the high seas and to protect against robbery in connection with such high seas enterprises. Plaintiffs' claims, however, concern an alleged terrorist attack which is outside the scope of the piracy prohibitions. Thus, plaintiffs are not within the class of persons designed to be protected by the stautes. Further, those statutes are completely silent as to any Congressional intention to provide a private cause of action. Plaintiffs' claims are in reality no more than common law tort allegations traditionally cognizable under state law. Thus, not only do the piracy statutes fail even to address the substance of plaintiffs' claims, but there also is no need or justification for inferrinng a federal cause of action under those statutes.

In sum, all of plaintiffs' "federal law" claims, in fact, do not involve federal law at all. Instead, these claims, as pleaded in Count I of each Complaint, are common law intentional tort claims. "[I]t is not to be supposed that Congress, in exercise of its regulatory authority, intends to shift from state to federal courts large bodies of private litigation absent some reasonably reliable evidence that this was its intention." 1 Moore's Federal Practices ¶ O.62[2.-2], at 668 (2d ed. 1980). Since there is no such Congressional intention demonstrated in these cases, Section 1331 jurisdiction cannot be sustained.

2. *Plaintiffs Have No Private Right of Action Under the Treaties of the United States.*

Count III of each Complaint is entitled "Tortious Actions in Violation of the Treaties of the United States." Plaintiffs have broadly alleged that the NAAA has violated the "treaties" enumerated in Count III and thus assert that they have claims "arising under" the treaties of the United States so as to confer subject matter jurisdiction on this Court.

(a) *The Defects in Plaintiffs' Count III Treaty Theory.*

The deficiencies in plaintiffs' "treaty theory" are numerous. First, as explained earlier, these actions do not involve any pivotal or substantial question concerning the application or interpretation of these "treaties." Thus, the actions do not arise under these treaties and this Court lacks Section 1331 subject matter jurisdiction.

Second, Section 1331 requires that claims arise under

United States *treaties*. Many of the so-called "treaties" cited by plaintiffs are not, in fact, treaties at all. Indeed, eight of the thirteen "treaties" are not presently treaty obligations of the United States, as documented by the United States Department of State in its annual publication entitled *Treaties in Force*.[17] Accordingly, no Section 1331 jurisdiction can arise from these defective allegations.

Finally, the actual treaties cited by plaintiffs do not provide them with any judicially enforceable rights. A treaty is a contract between the United States and other signatories of the treaty. When ratified, a treaty becomes the law of the United States, and, as such, *may* confer rights capable of judicial enforcement. *However, the general rule is that treaties do not confer any privately enforceable rights* and thus are deemed to be "executory" with respect to the rights of private individuals. Accordingly, except where a treaty is self-executing (and this is generally *not* the rule), Congress must implement the treaty though legislation before the treaty gives rise to a private right of action. *E.g., Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Diggs v Richardson*, 555 F.2d 848, 850-51 (D.C. Cir. 1976); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976);

---

17 The "treaties" which are not, in fact, U.S. treaty obligations are those set forth in paragraphs 103, 105-108, and 110-112 of the Complaint in Civil Action No. 81-0563 and paragraphs 110, 112-115 and 117-119 of the Complaint in Civil Action No. 81-0564. *See* Treaties Affairs Staff, Office of the Legal Adviser, Department of State, Treaties in Force (1979).

Chapalain Compagnie v. Standard Oil Co. (Indiana), 467 F. Supp. at 184.

There is no precise rule for determining whether a particular treaty constitutes an exceptional case such that it is self-executing and provides a person with privately enforceable rights for its violation. However, there are certain interpretive guides which courts rely upon to determine whether a treaty is executory or self-executing. First, if a treaty calls for each country to enact legislation concerning the treaty, it universally is held to be executory and thus no private rights are conferred by it. *See United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

Second, courts look to the words of a treaty to determine whether it evidences an intent to confer judicially enforceable rights upon individuals or whether it addresses governmental actions. For example, in *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976), the court considered whether a United Nations resolution[18] calling for nations to abstain from trade and other contacts with Namibia and South Africa gave rise to an implied right of action. The resolution stated that such contacts might "entrench" white authority over those areas. The court found the resolution executory:

> [W]e find that the provisions here in issue were not addressed to the judicial branch of our government. They do not by their terms confer rights upon individual citizens; they call upon governments to take cer-

---

[18] The court assumed without deciding that the U.N. Resolution constituted a binding American obligation and then concluded that the Resolution was entirely executory. *See* 555 F.2d at 850-51.

> tain action. The provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion. . . . The Resolution does not provide specific standards. The "entrenchment" standard of the Resolution, while possibly of such a nature that it might be elaborated by an international tribunal, is essentially the kind of standard that is rooted in diplomacy and its incidents, rather than in conventional adjudication, and is foreign to the general experience and function of American courts. In the absence of contrary indication in the international legislative history, and in the absence of domestic legislation evincing an intention for judicial enforcement, we conclude that the provisions of Resolution 301 involved here do not confer on individual citizens rights that are judicially enforceable in American domestic courts.

555 F.2d at 851 (footnotes deleted). Similarly, in *Sei Fujii v. State,* the California Supreme Court stated:

> In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.

242 P.2d 617, 620 (1952).[19]

---

[19] The approach in *Diggs v. Richardson* and *Sei Fujii v. State,* in focusing on the intention manifested in the treaty, is similar to that of the Supreme Court in recent cases (discussed above) regarding whether an implied right of action arises under various federal statutes. *See, e.g., Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979); *Cort v. Ash,* 422 U.S. 66 (1975). Accordingly, under *Diggs, Sei Fujii,* and these Supreme Court decisions, it is appropriate for this Court to inquire whether the treaties in question manifest a clear intention that private rights be created and

(Continued on next page)

(b) *No Private Cause of Action Arises Under the "Treaties" Cited by Plaintiffs.*

With the foregoing overview, we now review the "treaties" alleged to have been violated in Count III of each Complaint.[20] In each instance, these treaties confer *no* judicially enforceable rights such that plaintiffs' claims arise under these treaties. For convenience of the Court, we have attached as Exhibits 2-14 hereto the "treaties" cited by plaintiffs.[21]

Paragraphs 102 and 109. Alleged violation of Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949. (Exhibit 2). This Convention is clearly executory, since in Article 146 it expressly calls for participating nations to enact legislation to implement its provisions. Indeed, one court has explicitly held this Convention to be executory. *See Huynh Thi Anh v. Levi,* 586 F.2d 625, 629 (6th Cir. 1978). Accordingly, no private right of action arises under the treaty. *See, e.g., United States v. Postal,* 589 F.2d at 876-77.

(Continued from previous page)

whether, if so, plaintiffs are within that special class of persons intended to be protected by the treaty. Since plaintiffs cannot demonstrate that the treaties were designed to provide a private right of action to any person, their reliance on these treaties for federal jurisdiction cannot be sustained.

20 The dual paragraph numbers listed hereafter in the text are first from the Complaint in Civil Action No. 81-0563 and second from the Complaint in Civil Action No. 81-0564. For purposes of this discussion, we have included all "treaties," including those which are not, in fact, treaty obligations of the United States.

21 Many of the treaties cited by plaintiffs are quite lengthy. Accordingly, in most instances the exhibits contain only those portions of the treaties cited by plaintiffs in the Complaints.

Paragraphs 103 and 110. Alleged violation of Protocols I and II of Geneva Convention of August 12, 1949 (June 7, 1977). (Exhibit 3). First, these Protocols are not treaties. Further, there is no evidence that the federal courts were to be involved in enforcement of these Protocols. Indeed, the establishment of an International Fact-Finding Commission (Protocol I, Article 90) belies any such intention. The Protocols are directed to actions agreed to be taken by nations and thus do not evidence any intention to establish judicially enforceable individual rights. That would occur only with implementing legislation by each party thereto. *See Diggs v. Richardson,* 555 F.2d at 851.

Paragraphs 104 and 111. Alleged violation of Articles 1 and 2 of the United Nations Charter. (Exhibit 4). As courts have held, these provisions of the United Nations Charter are not self-executing and thus do not vest plaintiffs with any legal rights which may be asserted in court. *Pauling v. McElroy,* 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd,* 278 F.2d 252 (D.C. Cir.), *cert. denied,* 364 U.S. 835 (1960); *see Dreyfus v. Von Finck,* 534 F.2d at 30; *People of Saipan v. United States Department of Interior,* 502 F.2d 90, 100-03 (9th Cir. 1974) (Trask, J., concurring), *cert. denied,* 420 U.S. 1003 (1975); *Sei Fujii v. State,* 38 Cal. 2d 718, 242 P.2d 617 (1952).

Paragraphs 105 and 112. Alleged violation of U.N. General Assembly Resolution 2625 (XXV), Oct. 24, 1970, Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States. (Exhibit 5). This U.N. Resolution is not a treaty obliga-

tion of the United States and, further, is merely a general statement concerning relations among members of the United Nations. It evidences no intention to confer judicially protected rights on any individuals. *E.g., Diggs v. Richardson,* 555 F.2d at 851.

Paragraphs 106 and 113. Alleged violation of U.N. General Assembly Resolution 217A, the Universal Declaration of Human Rights. (Exhibit 6). This U.N. Resolution is not a U.S. treaty obligation. It is merely a general statement concerning human rights, evidencing no intention that the Resolution itself would grant a private judicial remedy to any individual. *Huynh Thi Anh v. Levi,* 586 F.2d at 629; *see Diggs v. Richardson.* Indeed, Article 8 clearly specifies that persons must look not to the Resolution but to each nation's other laws for judicially enforceable rights:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him *by the constitution or by law.*

Resolution 217A, Article 8 (emphasis supplied). Such reference to national laws is a clear indication of the executory nature of this Resolution. *See Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d at 1299.

Paragraphs 107 and 114. Alleged violation of U.N. General Assembly Resolution 2200A, the International Covenant on Civil and Political Rights (Exhibit 7). This Resolution is not a U.S. treaty obligation. Further, Article 2 of this Resolution expressly calls for each state to enact legislation to implement the Resolution. Thus, it is executory and confers no rights on plaintiffs. *Man-*

nington Mills, Inc. v. Congoleum Corp., 595 F.2d at 1298-99; *United States v. Postal*, 589 F.2d at 876-77.

Paragraphs 108 and 115. Alleged violation of U.N. General Assembly Resolution 2675 concerning Basic Principles for the Protection of Civilian Populations in Armed Conflicts. (Exhibit 8). This, again, is only a general declaration of principles, not amounting to a U.S. treaty, concerning the avoidance of civilian injuries during armed conflicts between warring states. There is no indication whatsoever that it is intended to confer judicially protected private rights. *See Diggs v. Richardson.*

Paragraphs 109 and 116. Alleged violation of the Hague Conventions of 1899 and 1907. (Exhibit 9). The Second Circuit recently ruled that no private right of action may be based on the Hague Conventions. *Dreyfus v. Von Finck*, 534 F.2d at 30.

Paragraphs 110 and 117 Alleged violation of U.N. General Assembly Resolution 260A concerning the Crime of Genocide. (Exhibit 10). This Resolution is not a U.S. treaty and, at any rate, is not applicable because these cases do not involve genocide. Further, Article V of this Resolution specifically calls for each state to enact implementing legislation. Accordingly, this Resolution is executory and provides no private right of action. *United States v. Postal*, 589 F.2d at 876-77.

Paragraphs 111 and 118. Alleged violation of U.N. General Assembly Resolution 1386 concerning the Declaration of the Rights of the Child. (Exhibit 11). This Resolution, which is not a U.S. treaty, is merely a general declaration of principles, evidencing no intention to

create, by its terms, any judicially enforceable rights. Indeed, in the Preamble it calls upon states to observe the stated principles "by legislative and other measures," an indication it was directed to actions to be taken by states, not individuals. *See Diggs v. Richardson,* 555 F.2d at 851. Thus it is clearly executory and confers no private right of action upon plaintiffs. *See United States v. Postal,* 589 F.2d at 876-77. Moreover, in a companion resolution (No. 1387), the General Assembly requested members to *publicize* the text of the Declaration. Thus, it is clear that this "treaty" was not intended to create privately enforceable rights.

Paragraphs 112 and 119. Alleged violation of the American Convention of Human Rights. (Exhibit 12). The United States is not even a signatory to this Convention (Exhibit 12 at 23), and therefore plaintiffs' reliance upon it to confer jurisdiction upon this Court is clearly without foundation. Moreover, in Article 28, the Convention expressly calls on members to enact legislation to implement its principles. Accordingly, it is executory and provides no private cause of action. *See United States v. Postal.*

Paragraphs 113 and 120. Alleged violation of Geneva Convention Relative to Treatment of Prisoners of War. (Exhibit 13). Aside from the fact that this Convention, on its face, deals with prisoners of war and not with the facts alleged in these cases, Article 129 of the Convention specifically calls for implementing legislation. Thus, the Convention is executory and provides no cause of action for plaintiffs. *See United States v. Postal.*

Paragraphs 114 and 121. Alleged violation of the OAS Convention to Prevent and Punish Acts of Terrorism.

(Exhibit 14). This Convention, on its face, has no application to these cases since it is primarily an extradition agreement. Further, the Convention, in repeated reference to members' laws *(e.g.,* Articles 1, 3 and 8), evidences the clear intention that this Convention be entirely executory. Accordingly, no private cause of action arises under the Convention. *See United States v. Postal.*

In short, as demonstrated above, none of the "treaties" upon which plaintiffs rely in Count III of the Complaints provide any judicially protected rights. Accordingly, plaintiffs' causes of action do not "arise under" the treaties of the United States, as required for Section 1331 jurisdiction.

B. *This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. § 1330.*

Plaintiffs have also alleged that this Court has subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11. This allegation must be rejected summarily.

First, 28 U.S.C. § 1330 confers subject matter jurisdiction on federal district courts only for damage claims *against a foreign state.* This statute does not provide subject matter jurisdiction over plaintiffs' claims against the NAAA which, of course, is not a foreign state.

Second, Section 1330 does not even apply to plaintiffs' claims against other defendants which are foreign states. Section 1330 grants subject matter jurisdiction only as to those few claims for which there is no immunity under 28 U.S.C. §§ 1605-07. Sovereign immunity for tort claims is still in effect under this statute, except where personal

injury or death occurs *in the United States. Id.* § 1605(a)(5); *see Letelier v. Republic of Chile,* 488 F.Supp. 665, 674 (D.D.C. 1980). Since it is undisputed in this instance that *plaintiffs' injuries occurred in Israel,* this Court has no Section 1330 jurisdiction over any defendant.

C. *This Court Has No Subject Matter Jurisdiction Under 28 U.S.C. §1332.*

Nor does this Court have jurisdiction of these actions under 28 U.S.C. § 1332, which provides for federal court jurisdiction where the parties are of diverse citizenship. The express terms of the statute and long-standing judicial interpretation make clear that Section 1332 cannot be used by plaintiffs herein to confer subject matter jurisdiction on this Court.

Under Section 1332, federal district courts have original jurisdiction of civil actions where the matter in controversy exceeds $10,000, and the action is between one of four specific sets of parties:

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; [or]

(4) a foreign state . . . as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).

First, plaintiffs have failed even to allege the mandatory jurisdictional facts concerning the defendants. The Complaints contain no averments whatsoever as to the

citizenship of any defendants. This glaring defect in plaintiffs' pleadings is alone sufficient to require dismissal of these actions. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Cameron v. Hodges*, 127 U.S. 322 (1888). Moreover, even if one could ignore this fatal defect, it is clear that the combination of plaintiffs and defendants in these cases fails to fall within any of the permissible categories set forth in Section 1332. Therefore, diversity jurisdiction cannot be sustained.

It is well established that a federal court lacks jurisdiction under Section 1332 unless there is complete diversity between plaintiffs and defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *Accord, City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941); *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028 (2d Cir. 1979), *amended* (1980); *Belle View Apartments v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979); C. Wright, Handbook of the Law of Federal Courts § 25, at 82 (2d ed. 1970). It is equally well established that the complete diversity requirement prohibits federal court jurisdiction if there are aliens—that is, persons or entities who are not United States citizens—on both sides of the litigation. *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807); *Field v. Volkswagenwerk, AG*, 626 F.2d 293, 296 (3d Cir. 1980) ("[The complete diversity] requirement pertains to suits between aliens as well as to suits between citizens."); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("Diversity jurisdiction under 28 U.S.C. § 1332 is defeated by the presence of aliens both as plaintiffs and as defendants."); *Ed and Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975); *Dassigienis v. Cosmos Carriers & Trading Corp.*, 442 F.2d 1016 (2d Cir. 1971);

Compagnie Nationale Air France v. Castano, 358 F.2d 203 (1st Cir. 1966); *Ex parte Edelstein,* 30 F.2d 636, 638 (2d Cir.), *cert. denied,* 279 U.S. 851 (1929) ("an alien may not sue an alien in a federal court"); *Fosen v. United Technologies Corp.,* 484 F.Supp. 490, 495 (S.D.N.Y. 1980) ("[T]his action is between two foreign litigants and so diversity jurisdiction cannot be sustained."); *Lavan Petroleum Co. v. Underwriters at Lloyds,* 334 F. Supp. 1069 (S.D.N.Y. 1971).

In the instant actions, all but seven plaintiffs are citizens of foreign states.[22] It is thus clear that this Court's jurisdiction cannot be based on subsection (a) (1) of Section 1332, since these actions are not between citizens of different states of the United States.

Similarly, plaintiffs cannot avail themselves of subsections (a) (2) or (a) (3) of Section 1332 because they fail to satisfy the mandatory requirement of complete diversity. Although plaintiffs do not allege the citizenship of any defendants, it is nonetheless clear that, at the very least, two defendants—the Libyan Arab Republic and the Palestine Liberation Organization—are ***not*** citizens of the United States. Because there are non-United States citizens among both plaintiffs and defendants, and thus there are aliens on both sides of the litigation, there can be no diversity jurisdiction. *Montalet v. Murray,* 8 U.S. (4

---

[22] In Civil Action No. 81-0563, all plaintiffs are alleged to be citizens of Israel or the Netherlands except one—Hanoch Tel-Oren, who is a U.S. citizen residing in Israel. In Civil Action No. 81-0564, all plaintiffs are alleged to be Israeli citizens or citizens of the Netherlands except six members of the Tel-Oren family, who are all U.S. citizens residing in Israel.

Cranch) 46 (1807); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Ed and Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975); *Compagnie National Air France v. Castano*, 358 F.2d 203 (1st Cir. 1966); *Ex parte Edelstein*, 30 F.2d 636 (2d Cir.), *cert. denied*, 279 U.S. 851 (1929). As one district court held in denying jurisdiction over a case brought by six plaintiffs, two of whom were foreign corporations, against several foreign corporate defendants:

> To sustain jurisdiction under [subdivision (a) (2) of Section 1332], it is an essential prerequisite that there be complete diversity of citizenship—that each and every party plaintiff be of different citizenship from all parties defendant . . . Complete diversity is negated however by the presence as plaintiffs of the two alien corporations . . . [Subdivision (a) (3) is also inapplicable because defendants] are not citizens of a foreign country.

Lavan Petroleum Co. v. Underwriters at Lloyds, 334 F. Supp. 1069, 1071 (S.D.N.Y. 1971). *Accord, Field v. Volkswagenwerk AG*, 626 F.2d 293, 296 (3d Cir. 1980) ("The [complete diversity] principle has been applied to deny jurisdiction in an action by an alien against citizens of a states and another alien.").

Finally, it is obvious that plaintiffs do not fall within subsection (a) (4) of Section 1332, since that subsection applies only to cases in which a foreign state is the *plaintiff*.

Therefore, because the parties to these cases do not fall within any of the permissible categories of Section 1332, and because, in any event, there is a lack of complete diversity between plaintiffs and defendants, this Court does not have jurisdiction of these actions under Section 1332.

In addition, plaintiffs cannot rely upon diversity jurisdiction because several plaintiffs are alleged to be United States citizens residing in Israel.[23] Section 1332 explicitly bases the diversity requirements upon the *state* citizenship of the parties. If a party is an American citizen who is not also a citizen of a particular state, it is well established that diversity jurisdiction does not lie. As Professor Wright explains:

> State citizenship is necessary for diversity jurisdiction. A person may be a citizen of the United States but domiciled abroad. Such a person is not a citizen of any state, and cannot sue or be sued in federal court on that basis.

C. Wright, Handbook of the Law of Federal Courts, § 24, at 80 (2d ed. 1970). *Accord, Sadat v. Mertes,* 615 F.2d 1176, 1180 (7th Cir. 1980) ("settled precedent establishes that a citizen of the United States who is not also a citizen of one of the United States may not maintain suit under [28 U.S.C. § 1332(a)(1)]."); *Smith v. Carter,* 545 F.2d 909 (5th Cir.), *cert. denied,* 431 U.S. 955 (1977); *Meyers v. Smith,* 460 F. Supp. 621, 624 (D.D.C. 1978); *Mohr v. Allen,* 407 F. Supp. 483, 487 (S.D.N.Y. 1976) ("A nonresident United States citizen does not satisfy the jurisdictional re-

---

[23] In Civil Action No. 81-0563, plaintiff Hanoch Tel-Oren, who purports to bring the action on behalf of Imry Tel-Oren, "is a citizen of the United States" (Complaint in Civil Action No. 81-0564, ¶ 4), whose residence is Omer nir Beersheba, Israel. (Complaint in Civil Action No. 81-0563, Caption). Similarly, in Civil Action No. 81-0564, plaintiffs Hanoch Sharona, Adiel, Reviva, Coronet and Nir Tel-Oren, are all United States citizens. They all reside in Omer nir Beersheba, Israel, except for Nir Tel-Oren who resides in Herzelya, Israel. (Complaint in Civil Action No. 81-0564, Caption and ¶ 4).

quirements set out for a diversity action"); *Kaufman and Broad, Inc v. Gootrad,* 397 F. Supp. 1054, 1055 (S.D.N.Y. 1975); *Hernandez v. Lucas,* 254 F. Supp. 901 (S.D. Tex. 1966); *Van der Schelling v. U.S. News & World Report, Inc.,* 213 F. Supp. 756 (E.D. Pa.), *aff'd per curiam,* 324 F.2d 956 (3d Cir. 1963), *cert. denied,* 377 U.S. 906 (1964). State citizenship for purposes of the diversity statute is based upon one's domicile. *Gilbert v. David,* 235 U.S. 561 (1915); *Chicago & N.W. Ry. v. Ohle,* 117 U.S. 123 (1886). In the case of the U.S. citizen plaintiffs in these actions, that domicile is Israel rather than one of the United States. *See* note 23, above. Thus, it is clear from the face of the Complaints that there can be no jurisdiction of these actions based on Section 1332 because certain plaintiffs are not "citizens of a State."

Nor can the United States citizen plaintiffs qualify for diversity jurisdiction as "citizens or subjects of a foreign state" under Sections 1332(a)(2) or (a)(3) based upon their residence in Israel. It is well established that for diversity purposes, a United States citizen who resides abroad cannot be a citizen or subject of the country in which he resides unless he renounces his United States citizenship. *Pemberton v. Colonna,* 290 F.2d 220 (3d Cir. 1961). *Accord, Smith v. Carter,* 545 F.2d 909 (5th Cir.), *cert. denied,* 431 U.S. 955 (1977); *Kaufman and Broad, Inc. v. Gootrad,* 397 F. Supp. 1054 (S.D.N.Y. 1975); *Haggerty v. Pratt Institute,* 372 F. Supp. 760 (E.D.N.Y. 1974); *Hernandez v. Lucas,* 254 F. Supp. 901 (S.D. Tex. 1966); *Van der Schelling v. U.S. News & World Report, Inc.,* 213 F. Supp. 756, 761-62 (E.D. Pa.), *aff'd per curiam,* 324 F.2d 956 (3d Cir. 1963),*cert. denied,* 377 U.S. 906 (1964). Ac-

cordingly, the NAAA submits that this Court does not have jurisdiction over these actions based on Section 1332 not only because there is not complete diversity, but also because plaintiffs include American citizens residing abroad. As Professor Moore notes in summarizing the law in this point:

> An American citizen who is domiciled in a foreign country is neither a citizen of a state nor a citizen or subject of the country of his inhabitance. Thus, he cannot sue or be sued on the basis of diversity jurisdiction in the federal courts.

1 Moore's Federal Practice ¶ 0.74[4], at 708.1 (2d ed. 1980).

D. *28 U.S.C. § 1350 Does Not Grant Subject Matter Jurisdiction Over Plaintiffs' Claims Against the NAAA.*

In paragraph 1 and in Count II of each Complaint, plaintiffs have alleged that subject matter jurisdiction exists under 28 U.S.C. § 1350. This jurisdictional allegation cannot be sustained against the NAAA because all plaintiffs are not aliens and because the NAAA has committed no tortious acts such as to invoke Section 1350 jurisdiction.

Section 1350 is explicit in its jurisdictional requirements:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Thus, under Section 1350, this Court must answer affirmatively all three of the following questions:

— Is the plaintiff an alien?

— Is each defendant properly alleged to have committed a tort?

— Is the tort of each defendant a violation of the law of nations or a U.S. treaty?

Plaintiffs clearly do not satisfy the first two criteria and hence jurisdiction cannot be founded on Section 1350. The Court thus need not determine whether the torts alleged to have been committed were "in violation of the law of nations or a treaty of the United States."

First, the plaintiffs are not all aliens. Rather, as noted above, in each case at least one United States citizen is suing the defendants. Section 1350, by its plain limitation of plaintiffs to aliens, denies this Court subject matter jurisdiction where non-aliens are plaintiffs. This is similar to the requirement, discussed in the preceding section, that under the diversity statute, *complete* diversity must exist. Accordingly, Section 1350 cannot provide subject matter jurisdiction with respect to either of these actions.

Second, plaintiffs have not alleged any act by the NAAA which would constitute a tort against plaintiffs, much less a violation of the law of nations or the treaties of the United States. Plaintiffs allege that it was the El Fatah faction of the PLO, acting *"at the direction of the PLO,"* which carried out the March 11, 1978 attack.[24] Thus, plaintiffs plainly do not charge that the NAAA did, in fact, cause any injury to plaintiffs or even that such injury was caused at the direction of the NAAA.

---

[24] See Complaint, Civil Action No. 81-0563, ¶ 32; Complaint, Civil Action No. 81-0564, ¶ 40.

Plaintiffs' Section 1350 jurisdiction theory, then, must rest on the broad allegation (which is totally false in any event) that the NAAA somehow conspired, through alleged planning, funding, and equipment procurement, to carry out the actual attack. There are several shortcomings, however, in this effort to invoke this Court's jurisdiction. First, a conspiracy to commit an intentional tort does not, in fact, constitute a "tort."[25] Particularly where, as here, the defendant NAAA clearly never had any role in the conduct (*i.e.*, the attack) which comprised the tortious act, an allegation of conspiracy cannot meet the Section 1350 requirement that the defendant have committed a tort. Moreover, none of the acts alleged to have been performed by the NAAA—devising a plan, providing funds, procuring equipment—could themselves be said to constitute a tort. Since Section 1350 requires, *for jurisdictional purposes,* that *the NAAA* have committed a tort, and since none of the acts alleged to have been performed by the NAAA constitute a tort, there is no Section 1350 jurisdiction over the NAAA.

The Section 1350 requirement that a "tort" be committed by the defendant is a critical jurisdictional fact in these cases. As demonstrated in the attached Affidavit of Joseph D. Baroody (Exhibit 1), the NAAA never planned, funded or procured equipment for this or any

---

[25] Civil conspiracy is not in itself an actionable tort. It is well established that "the gist of the civil action of conspiracy is the . . . tortious act complained of." *Burns v. Spiller,* 4 F.R.D. 299 (D.D.C. 1945), *aff'd,* 161 F.2d 377 (D.C. Cir.), *cert. denied,* 332 U.S. 792 (1947). *See also Nalle v. Oyster,* 230 U.S. 165 (1913); 16 Am. Jur. 2d Conspiracy, § 49; Prosser, Handbook of the Law of Torts, § 47, at 293 (4th ed. 1971).

other allegedly terrorist incident. Plaintiffs' allegations in the Complaints do not, in fact, allege specific tortious conduct by the NAAA. Rather, plaintiffs' allegations are nothing more than broad, generalized "boilerplate"—indeed identical bald allegations are made against the NAAA, the Palestine Information Office, and the Palestine Congress of North America. Moreover, the Complaint is not verified and the boilerplate allegations are not even dignified with recitations of "on information and belief"—suggesting, indeed, that those allegations are based on idle fantasy and pure speculation.[26]

Given the grossly inaccurate pleading in each Complaint, plaintiffs should *not* be permitted to impose subject matter jurisdiction on this Court without some scintilla of evidence demonstrating possible NAAA involvement in the incident in question. Just as reference to a federal statute does not create jurisdiction under Section 1331, mere generalized and conclusory allegations of tort, without *any* tangible connection to the named defendant, cannot confer jurisdiction under Section 1350.

We recognize that plaintiffs cannot be expected to present their entire case at this time. However, the NAAA contends that there is simply no basis whatsoever for the naming of the NAAA as a defendant in these actions, as documented in Mr. Baroody's Affidavit. The

---

[26] The allegations clearly cannot be true under any possible set of circumstances since the Palestine Information Office was not even organized until March 15, 1978, and the Palestine Congress of North America was not created until September, 1980, both after the incident at issue. Entities which did not even exist on March 11, 1978, could not possibly be liable as plaintiffs have alleged.

NAAA and this Court, therefore, are entitled to a demonstration *now* that plaintiffs *do* have a tangible basis for having named the NAAA as a defendant. If they have no such basis, then Section 1350 jurisdiction surely cannot be sustained and appropriate sanctions will be in order.[27]

III. *Plaintiffs' Claims are Barred by the Statute of Limitations.*

The NAAA's Motion to Dismiss must also be granted because the applicable statute of limitations has run on plaintiffs' claims against the NAAA. Under the principles of *Erie Railroad Co. v. Thompkins,* 304 U.S. 64 (1938), as applied to the federal courts in the District of Columbia, this Court must look to District of Columbia law to determine which statute of limitations to apply to plainiffs' claims. *Steorts v. American Airlines, Inc.,* No. 79-1215 (D.C. Cir., filed Feb. 19, 1981) *See also Lee v. Flintkote Co.,* 593 F.2d 1275 (D.C. Cir. 1979). It is well established under District of Columbia law that "a limitation on the time of [bringing a] suit is procedural and is governed by the law of the forum." *Kaplan v. Manhattan Life Insurance Co.,* 109 F.2d 463, 465-66 (D.C. Cir. 1939). *Accord, Hodge v. Southern Ry.,* 415 A.2d 543 (D.C. 1980); *May Department Stores Co., Inc. v. Devercelli,* 314 A.2d 767 (D.C. 1973). Since a District of Columbia court would apply its own statute of limitations to an action before it, regardless of where the cause of action might have arisen, it is clear that this Court similarly must apply the D.C. statute of limitations to plaintiffs' claims. *Steorts v. American Airlines, Inc.,* No. 79-1215 (D.C. Cir., filed Feb. 19, 1981).

---

[27] *See, e.g.,* Fed. R. Civ. P. 11.

Section 12-301 of the D.C. Code provides that an action "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment" must be brought within one year "from the time the right to maintain the action accrues." D.C. Code § 12-301(4). It is plain that all the claims asserted by plaintiffs in these actions are time-barred under this statute.

The incident upon which plaintiffs' claims are based allegedly occurred on March 11, 1978, and plaintiffs (or the decedents whom plaintiffs in Civil Action No. 81-0563 purport to represent) suffered the injuries of which they complain on that date.[28] Thus, the right to maintain these actions accrued on March 11, 1978. These lawsuits were not filed, however, until March 10, 1981, nearly three years after the alleged causes of action had accrued. Accordingly, these actions should be dismissed because the applicable one-year statute of limitations had long since expired prior to the initiation of these lawsuits.

Count I of each of the Complaints purports to assert a cause of action based on "the intentional torts of assault, battery, false imprisonment, intentional infliction of mental distress and/or intentional infliction of cruel, inhuman and degrading treatment."[29] The allegedly tortious acts are described by plaintiffs as follows:

---

[28] Complaint, Civil Action No. 81-0563 ¶¶ 32 and 48 Complaint, Civil Action No. 81-0564, ¶¶ 40 and 56.

[29] Complaint, Civil Action No. 81-0563 ¶ 64; Complaint, Civil Action No. 81-0564 ¶ 71. The allegations in Civil Action No. 81-0563 also include the additional "intentional tort of murder."

> The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment.[30]

It is beyond dispute that plaintiffs' claims for assault, battery and false imprisonment are time-barred by the one-year limitations period of Section 12-301(4). Plaintiffs' remaining claims are similarly barred. The allegations that plaintiffs denominate as "causes of action" for the additional so-called "intentional torts" of "infliction of mental distress" and 'infliction of cruel, inhuman and degrading treatment," do no state separate or distinct rights of action. Indeed, the Complaints do not even purport to allege any facts to support the independent existence of these so-called "causes of action". Instead, by plaintiffs' own allegation, these "causes of action" arise out of the same conduct which allegedly constitutes the assault, battery, and false imprisonment. In Count I plaintiffs have done no more than assign two additional labels to that conduct.

Assumming for the sake of argument that the law of the District of Columbia would recognize independent causes of action for the so-called torts of infliction of mental distress and infliction of cruel, inhuman and degrading treatment, no such torts are properly pleaded in the Complaints. The infliction of mental distress and of cruel, inhuman and degrading treatment, as pleaded by plaintiffs

---

30 Complaint, Civil Action No. 81-0563 ¶ 56; Complaint, Civil Action No. 81-0564 ¶ 64. In Civil Action No. 81-0563, plaintiffs also allege that defendants "murdered" the plaintiffs.

in Count I, are obviously nothing more than supplemental descriptions of conduct which is fully encompassed by the traditional common law intentional torts of assault, battery, and false imprisonment.

This Court should not countenance plaintiffs' transparent attempt to circummvent the one-year statute of limitations in their Count I allegations. Congress clearly intended Section 12-301(4) to apply to all intentional torts of the type asserted in Count I. The mere fact that plaintiffs came up with new words to describe the traditional terms chosen by Congress in drafting the statute, does not change the substance or the nature of the claims asserted by plaintiffs in Count I.

It is well established that "[t]he label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states." *Aktiebolaget Bofors v. U.S.*, 194 F.2d 145, 148 (D.C. Cir. 1951). *Accord, Johnson v. U.S.*, 547 F.2d 688 (D.C. Cir. 1976); *Blitz v. Boog*, 328 F.2d 596, 599 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964) ("It is, of course, the substance of the claim, and not the language used in stating it, that controls."); *Universal Airline v. Eastern Air Lines*, 188 F.2d 993 (D.C. Cir. 1951); *Hendry v. U.S.*, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd.*, 418 F.2d 774 (2d Cir. 1969).

Furthermore, as the Circuit Court held in ruling that the *nature* of a claim determines which statute of limitations applies, "the statute of limitations . . . cannot be evaded by referring to [a] cause of action in some other terms." *Universal Airline v. Eastern Air Lines*, 188 F.2d at 996. Thus, because Count I of these Complaints, *in substance*, alleges nothing more than claims for the inten-

tional torts covered by Section 12-301(4), the one-year limitations period of that statute must be applied. Accordingly, Count I of each of the Complaints should be dismissed in its entirety.

Similarly, Counts II, III, IV and V of the Complaints are also barred by Section 12-301(4). In Counts II, III and IV, plaintiffs merely restate the substantive allegations of Count I[31] and then supply yet another set of labels to those intentional tort claims.[32] Count V, which also repeats the same Count I substantive allegations,[33] purports to state a claim for conspiracy to commit the torts alleged in Counts I through IV.

As noted above, the Court must look to the *substance* of these claims to determine which statute of limitations to apply. The substance of the claims contained in Counts II through V is clearly identical to that of the claims in Count I—intentional torts. Like Count I, therefore, Counts II through V are subject to the one-year limitations period contained in D.C. Code § 12-301(4) and, accordingly, they are time-barred and should be dismissed.

Finally, the fact that plaintiffs in Civil Action No. 81-0563 purport to bring that action pursuant to D.C. Code §

---

31 *Compare* Complaint, Civil Action No. 81-0563 ¶¶ 56-63 *with* ¶¶ 67-69, 99-101, and 119-21; and *compare* Complaint, Civil Action No. 81-0564 ¶¶ 64-70 *with* ¶¶ 74-76, 106-08, and 126-28.

32 Counts II, III and IV allege, respectively, torts in violation of: the law of nations, the treaties of the United States, and the laws of the United States.

33 *Compare* Complaint, Civil Action No. 81-0563 ¶¶ 56-63 *with* ¶¶ 134-35; and *compare* Complaint, Civil Action No. 81-0564 ¶¶ 64-70 *with* ¶¶ 141-42.

12-101 (the "Survival Act"), has no effect on the statute of limitations analysis set forth above. Representatives of persons who allegedly died as a result of the March 11 bus attack bring Civil Action No. 81-0563 on behalf of their decedents, pursuant to Section 12-101.[34] That section provides:

> On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to this death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.

As the statute itself makes clear, the Survival Act merely permits the legal representative of a deceased person to pursue a right of action that had accrued *to the deceased* prior to his death. The statute does not create a new right of action; rather, it "permits the injured person's *own claim* to be enforced after his death by his legal representatives." *Wharton v. Jones,* 285 F. Supp. 634, 635 (D.D.C. 1968). *Accord, Semler v. Psychiatric Institute,* 575 F.2d 922 (D.C. Cir. 1978); *Hudson v. Lazarus,* 217 F.2d 344 (D.C. Cir. 1954); *Thomas v. Doyle,* 187 F.2d 207 (D.C. Cir. 1950).

Because an action brought pursuant to the Survival Act is, in fact, a suit to enforce the deceased's cause of action, it is clear that the statute of limitations applicable to the deceased's right of action must be applied to the claim. *Strother v. District of Columbia,* 372 A.2d 1291 (D.C. 1977). *Accord, Jones v. Rogers Memorial Hospital,* 442 F.2d 773 (D.C. Cir. 1971); *Levy v. Baptist Hospital of*

---

[34] Complaint, Civil Action No. 81-0563, ¶ 4.

Miami, Inc., 210 So.2d 730 (Fla. Dist. Ct. App. 1968); *Kimberly v. DeWitt*, 606 P.2d 612 (Okla. Ct. App. 1980); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A.2d 406 (1946); *Stegner v. Fenton*, 351 Pa. 292, 40 A.2d 473 (1945). As the Circuit Court has stated:

> Unlike the wrongful death statute, . . . the survival statute creates no new right of action. It permits survival of a right of action that accrued to the deceased. *The statute of limitations commences running when the right of action first accrues to the deceased.*

Jones v. Rogers Memorial Hospital, 442 F.2d at 774 n.1 (emphasis supplied and citations omitted).

Thus, with respect to Civil Action No. 81-0563, as with Civil Action No. 81-0564, the statute of limitations began to run on March 11, 1978, when plaintiffs' decedents were allegedly injured. Similarly, because the decedents' causes of action are identical to those brought by the plaintiffs in Civil Action No. 81-0564 (except for the addition of an asserted claim for the "intentional tort of murder")—that is, for the intentional torts covered by the one-year limitations period in D.C. Code § 12-301(4)—the claims asserted in Civil Action No. 81-0563 are time-barred and therefore should be dismissed.

IV. *Conclusion.*

For the foregoing reasons, defendant NAAA submits that its Motion to Dismiss the Complaints in Civil Action Nos. 81-0563 and 81-0564 should be granted.

Respectfully submitted,

Hill, Christopher and Phillips, P.C.

By: Cherif Sedky
Lawrence Coe Lanpher
Karla J. Letsche

1900 M Street, N.W.
Washington, D. C. 20036
(202) 452-7000

Attorneys for Defendant
National Association of Arab
Americans, Inc.

Dated: April 15, 1981
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of defendant National Association of Arab Americans to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Expiration of the Limitations Period, with accompanying Memorandum of Points and Authorities in support thereof and two proposed orders, was delivered by hand this 15th day of April, 1981, to the following counsel of record: Michael S. Marcus, Esq., Lewis, Wilson, Lewis & Jones, Ltd., 2054 North Fourteenth Street, Post Office Box 827, Arlington, Virginia 22216, counsel for plaintiffs; and a copy was mailed, postage prepaid, to each of the following parties:

Libyan Arab Republic
1118 Twenty-Second Street, N.W.
Washington, D.C.

Palestine Information Office
1326 Eighteenth Street, N.W.
Washington, D. C.

Palestine Congress of North America
Post Office Box 9621
Washington, D. C. 20016

/s/ Cherif Sedky

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN, on behalf of the deceased, Lmry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED BY PLAINTIFFS IN OPPOSITION TO THE MOTION OF NATIONAL ASSOCIATION OF ARAB AMERICANS TO DISMISS THE COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR EXPIRATION OF THE LIMITATIONS PERIOD

LEWIS, WILSON, LEWIS & JONES, LTD.
2054 North Fourteenth Street
Post Office Box 827
Arlington, Virginia 22216
(703) 527-8800

JOSEF LIVNE, ESQUIRE
16 Iben Sina Street
Haifa, Israel

Counsel for Plaintiffs

Of Counsel:

OREN R. LEWIS, JR., ESQUIRE
RICHARD H. JONES, ESQUIRE
MICHAEL S. MARCUS, ESQUIRE
WILLIAM E. DONNELLY, ESQUIRE

Dated: April 30, 1981
Arlington, Virginia

TABLE OF CONTENTS

		Page
I.	Factual Background	1
II.	Allegations in the Complaint are Sufficient to Overcome a Jurisdictional Attack Premised on a Factual Basis.	9
III.	The Torts Alleged in the Complaint are Properly Characterized as Torts in Violation of the Law of Nations, Torts in Violation of the Treaties of the United States, and Torts in Violation of the Laws of the United States; More Specifically, They are the Internationally Recognized Torts of Torture, Terror, Hostage-Taking, and Genocide.	10
IV.	Acts in Furtherance of Tortious Conduct are Actionable Torts.	12
V.	This Court has Jurisdiction Over the Causes of Action Against the NAAA Brought by All Plaintiffs Pursuant to 28 U.S.C. §1331 as They Arise Under the Laws of Nations and Thus the Laws of the United States.	14
	A. The Tortious Conduct of the PLO Terrorists is in Violation of the Law of Nations.	14
	B. The Law of Nations is Part of the Federal Common Law.	18
	C. Tortious Actions Under Federal Common Law Arise Under the Laws of the United States as that Phrase is Used in Article III of the Constitution and in 28 U.S.C. 1331.	19
VI.	This Court has Jurisdiction Over the Causes of Action of All Alien Plaintiffs Against NAAA Pursuant to 28 U.S.C. 1350 Because the Tortious Actions are in Violation of the Law of Nations.	21

Page

VII. This Court has Jurisdiction Over the Causes of Action of All Plaintiffs Against NAAA Pursuant to 28 U.S.C. 1331 as They Arise Under the Treaties of the United States. 23

VIII. The Complaints of Plaintiffs were Filed Within the Applicable Limitations Period..... 28

A. Plaintiffs' Causes of Action in Counts II Through V of the Complaints are Governed by the Three-Year Statute of Limitations of D. C. Code §12-301(8). 28

B. Plaintiffs' Causes of Action in Count I of the Complaints for Intentional Infliction of Emotional Distress and Intentional Infliction of Cruel, Inhuman and Degrading Treatment are not Barred by the One-Year Limitation Period Provided for in D. C. Code §12-301(4) Because They are not Among the Torts Specifically Enumerated Therein. 31

C. To the Extent that the One-Year Limitations Period of D. C. Code §12-301(4) is Applicable to any of the Claims of Plaintiffs as Asserted in the Complaints, the Running of the Statute of Limitations was Tolled by NAAA's Intentional Concealment of its Involvement in the Actions Giving Rise to Plaintiffs' Claims. 33

D. Irrespective of Which Statute of Limitations is Found to be Applicable, None of the Claims of the Minor Plaintiffs can be Barred by the Statute of Limitations..... 34

IX. Conclusion 34

TABLE OF CASES

Page

* *Abdul-Rahman Omar Odra v. Clift*, 195 F.Supp. 857 (D.Md. 1961) 22

* *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1978) 28

* *Asakura v. City of Seattle*, 265 U.S. 332 (1924) 23

Bacardi Corporation v. Domenech, 311 U.S. 150 (1940) 23

Balfour, Gutherie & Company v. United States, 90 F.Supp. 831 (N.D. Cal. 1950) 27

* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) 18, 19

Bell v. Hood, 327 U.S. 678, 682 (1946) 28

Cassel v. Taylor, 100 U.S. App. D.C. 153, 243 F.2d 259 (1957) 30-31

* *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C. 1971) 28

* *Cort v. Ash*, 422 U.S. 66 (1975) 28

* *Diggs v. Richardson*, 180 U.S. App. D.C. 376, 555 F.2d 848 (1976) 25, 27

* *Duke Power Co. v. Carolina Environmental Study Group, Inc., et al.*, 438 U.S. 59 (1973) 28

El Ranco, Inc. v. First National Bank of Nevada, 406 F.2d 1205 (9th Cir. 1968) 13

Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) 13

* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 14, 15, 17, 18, 19, 20, 21, 22, 27, 29

Page

* *Fitzgerald v. Seamons,* 188 U.S. App. D.C. 175, 553 F.2d 220 (1977) 33

Forrestal Village, Inc. v. Graham, 179 U.S. App. D.C. 225, 551 F.2d 411 (1977) 31

Gibson v. Gibson, 240 Ark. 827, 402 S.W.2d 647 (1966) 33

* *Hampton v. Hanrahan,* 600 F.2d 600 (6th Cir. 1979) 13

* *Hartigh v. Latin,* 158 U.S. App. D.C. 289, 485 F.2d 1068 (1973), *cert. denied* sub nom: *District of Columbia v. Marsh,* 415 U.S. 948 (1974) 9, 27

Hulmberg v. Armbrecht, 327 U.S. 392 (1946) 33

Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) 26

* *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972) 19, 20

In Re Extradition of Ziyad Abu Eain, N.D. Ill. 1979 16

* *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964) 28

* *Laffey v. Northwest Airlines, Inc.,* 185 U.S. App. D.C. 322, 567 F.2d 429 (1976), *cert. denied,* 436 U.S. 1086 ..... 30, 31

Laffey v. Northwest Airlines, Inc., 481 F.Supp. 199 (D.D.C. 1974) 31

* *Payne v. Government of the District of Columbia, et al.,* 182 U.S. App. D.C. 188, 559 F.2d 809 (D.C. Cir. 1977) 12, 27, 29

Scott v. Moore, 461 F.Supp. 224 (E.D. Tex 1978) 13

Sonne v. Sachs, 314 A.2d 194 (Del. 1978) 33

* *The Head Money Cases,* 112 U.S. 580 (1884) 23, 24, 25, 26

Page

The Nereide, 13 U.S. (9 Cranch.) 388 (1815) 18

* *The Paquete Habana,* 175 U.S. 677 (1900) 14, 18

* *The People of Saipan v. United States Department of Interior,* 502 F.2d 90 (9th Cir. 1974) 24, 25

* *Trans-Bay Engineers and Builders, Inc. v. Hills,* 179 U.S. App. D.C. 184, 551 F.2d 370 (1976) 19

United States v. A. L. Burbank and Company, Ltd., 525 F.2d 9 (2d Cir. 1975) 23

United States v. Klintock, 180 U.S. (Wheat) 144 (1820) 11

United States v. Pirates, 18 U.S. (Wheat) 184 (1820) 11

United States v. Postal, 589 F.2d 862 (5th Cir. 1979) 26

* *United States v. Smith,* 18 U.S. (5 Wheat) 153 (1820) 14, 18

* *United States v. Steinberg,* 478 F.Supp. 29 (N.D. Ill. 1979) 27

United States v. The LaJeune, 26 F.Cas. 15,551 (Cir. Mass. 1822) 11

* *Watkins v. Wilson,* 425 F.Supp. 166 (D.D.C. 1977) 9

STATUTES

Page

28 U.S.C. § 1331 ..... 10, 19, 20, 21, 22

28 U.S.C. § 1350 ..... 10, 20, 21, 22

D. C. Code § 12-301(4) 31, 32, 33

D. C. Code § 12-301(8) 30, 31, 33

D. C. Code § 12-302(a)(1) 34

INTERNATIONAL MATERIALS

	Page
American Convention of Human Rights (November 22, 1969)	26
Convention on the Prevention and Punishment of the Crime of Genocide, U.N. General Assembly Resolution 260 (III) (December 6, 1948)	15, 17
Declaration of the Rights of the Child, U.N. General Assembly Resolution 1386 (XIV) (1959)	15
Declaration on the Protection of All Persons From Being Subject to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, (U.N. Declaration 1975)	17
Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, (Submitted to U.N. General Assembly by the United States, September, 1972)	14, 15
European Convention on the Suppression of Terrorism (November, 1976)	15
European Convention for the Protection of Human Rights and Fundamental Freedoms	15
Geneva Convention for the Prevention and Punishment of Terrorism, (November 16, 1937)	15
Geneva Convention for the Protection of Civilian Persons in Time of War, (August 12, 1949)	15,26
International Covenant on Economic, Social and Cultural Rights	15
Organization of American States: Convention to Prevent and Punish Acts of Terrorism, (February 2, 1971)	15
Principles of the Law of Nations Against Committing Terrorism on Civilian Populations, U.N. General Assembly Resolution 2444 (XXIII) (1968)	15

Page

Protocol I to Geneva Convention Relating to the Protection of Victims of International Armed Conflicts, (June 8, 1977) 15

Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Inter-American Juridical Committee, October, 1970 ..... 11, 16

Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (Effective October 24, 1945) 14

United Nations Charter (signed June 26, 1945) 15

Universal Declaration of Human Rights, U.N. General Assembly Resolution 217A (III), (December 6, 1948) 15, 16, 27

MISCELLANEOUS AUTHORITIES

Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Counsel Resolution 276 (1970) [1971] ICJ 16 17

51 Am. Jur. 2d, Limitation of Actions, §63 (1970) 33

Department of State Bulletin, January 24, 1970 18

Department of State Bulletin, January 24, 1977 18

Federal Jurisdiction of International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, Harvard International Law Journal, Vol. 22, No. 1 (Winter, 1981) 10, 14, 29

Human Events, December 13, 1980 5

International Terrorism and Political Crimes, M. Cherif, Charles C. Thomas (1975) 16

New Code for the Protection of Civilian Populations and Property During Armed Conflict,

Page

Ionei Closca, International Review of the Red Cross, November-December, 1980 16

Nuclear Tests (Australia v. France), Judgment of December 20, 1974 [1974] ICJ 253 17

Prosser, *Law of Torts,* (4th Ed. 1971) § 12 32

Restatement (Second) of the Law of Torts § 46 (1977) 32

Restatement (Second) of the Law of Torts § 876 (1977) 13

Restatement (Second) of the Law of Torts § 877 (1977) 13

San Diego Union, April 20, 1979 9

The PLO Underground in California, Ehud Young, *New West* (Feb. 26, 1979) 9

The Terror Network, Claire Sterling, Holt, Reinhart and Winston (1981) 6

Washington Post, March 13, 1978 3

Washington Post, August 2, 1978 3

CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED BY PLAINTIFFS IN OPPOSITION TO THE MOTION OF NATIONAL ASSOCIATION OF ARAB AMERICANS TO DISMISS THE COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR EXPIRATION OF THE LIMITATIONS PERIOD

COME NOW, the plaintiffs, in Civil Action Nos. 81-0563 and 81-0564, and hereby submit this Memorandum in opposition to the motion of the National Association of Arab Americans, Inc. ("NAAA") to dismiss the complaints for lack of subject matter jurisdiction and for expiration of the limitations period. This Court has jurisdiction to

entertain the causes of action enumerated in the complaints against each of the defendants, including the NAAA, pursuant to 28 U.S.C. 1331 and 1350.[1] The causes of action are not barred by any appropriate statute or period of limitations. Whether this Court utilizes the period of limitation incorporated in the federal common law or the District of Columbia Statute of Limitations, the appropriate period of limitations for the alleged causes of action is three years. The complaints on behalf of the plaintiffs were filed within the three-year period of limitations.

I. FACTUAL BACKGROUND

On March 11, 1978, the surviving plaintiffs and decedents were subjected to inhuman and barbaric treatment by members of the El Fatah faction of the Palestine Liberation Organization ("PLO"). They were tortured, terrorized, held hostage, murdered, mutilated, forced to watch the mutilation and murder of loved ones, and were forced to remain in a burning inferno.[2] Mothers and fathers watched helplessly as their children were shot and burned alive. Children watched in shock as fathers and mothers were murdered and mutilated in front of their eyes. Every standard of human conduct accepted by the civilized world was violated by these PLO terrorists.

None of these victims were armed or able to defend themselves, nor were any of them members of the Israeli

---

1 While for the sake of brevity the plaintiffs will not address herein the Court's jurisdiction pursuant to 28 U.S.C. 1332 or 1602-11, this is not to be construed or implied that the plaintiffs have abandoned these authorities as jurisdictional bases for the enumerated causes of action.

2 See Appendix A which is photographs of the commandeered bus after the attack.

military or any armed civilian police unit. Most of the victims were women, children, babies and old men. Against this group of unarmed civilians, the PLO terrorists used bazookas, hand grenades, machine guns and other weapons of deadly force.

The PLO terrorists did not even know the identity of their victims. These unfortunate human beings were selected at random by the PLO to be subjected to their indiscriminate and barbaric violence. The victims were citizens of the United States, the Netherlands and the State of Israel.

The purpose of this criminal and barbaric mission, as formulated by the PLO and the Libyan Arab Republic ("Libya") was to capture and hold as hostages Israeli civilians for the purpose of extorting the release of certain PLO terrorists in Israeli jails. The plan called for the terrorists to demand that the British and Rumanian ambassadors to Israel and the United Nations representative in Israel surrender themselves as hostages to guarantee the safe conduct of the terrorists to Damascus aboard a United Nations plane.

The terrorists were ordered by the PLO and Libya to kill all the hostages if their mission at any stage did not proceed according to plan, regardless of whether the hostages were women, children and/or old men. Both the PLO and Libya were well aware that it was a policy of Israel not to negotiate with terrorists or to agree to such extortion. The PLO and Libya in structuring the mission contemplated a mass murder.

The terrorist mission of the PLO cannot in any way be described as a military operation. Not only were the

victims unarmed civilians but there were no military objectives anywhere near the landing point used by the terrorists. The highway at which the terrorists commandeered the vehicles was a civilian and not a military highway. The vehicles commandeered were civilian buses and taxi cabs engaged in normal commerce.

As a result of the actions of the PLO terrorists, twelve children and twenty-two adults were killed, and fourteen children and sixty-three adults were seriously injured. Many of those killed were burned alive in the smoldering bus. The survivors sustained serious and permanent physical injuries, including the loss of limbs, burns to all parts of their bodies, and incapacitating internal injuries. All of the survivors sustained serious and permanent mental, emotional and psychological injuries. Many of the survivors are incapable of pursuing their former professions or performing normal life functions. Lives have been ruined. Families have been destroyed.

The statements of certain defendants in this case concerning the barbaric attack are very revealing. The general command of the forces of the PLO stated on the day of the attack, "We instructed the Deir Yassin force to carry out an operation in the conquered land in the name of the martyr, Kamal Adwan. The force began carrying out its task in the coastal area between Haifa and Tel Aviv at 18.40." The radio voice of the PLO from Lebanon on March 12, 1978 stated, "In the depths of the conquered land today there came the reaction of the people of Palestine, pioneers against the intrigue of the agents and traitors. Our fighters achieved an important revolutionary achievement, when they opened a broad front against the conquering occupationary forces in the heart of conquered

Palestine. This achievement represents . . . an assurance to our heroes that the revolution will continue to realize additional targets until the flag of Palestine will wave above our land and in the skies of our independent state."

Libya's official radio, in commenting on the March 11 massacre, heartily endorsed what it referred to as the heroic action of the Palestinians.[3] Libyan radio added that all doors must be opened to the just and legal struggle of the Palestinians and they must be allowed to strike the enemy in conquered Palestine.

Hisham Sharabi, at the time of the March attack, was a director of the NAAA and was a member of its executive committee. Subsequent to May, 1978, he served as the president of the NAAA. In commenting upon the barbaric attack Sharabi characterized the raid as showing that the Palestinians are willing "to hurl their bodies against the monster." He also stated, "I don't condemn the use of violence, as such, when it is carried out in a just cause, such as that of the Palestinians."[4] Sharabi, at the time of the raid, was and remains a close personal friend of Yasar Arafat, leader of the PLO and was and remains in close consultation with Arafat. Sharabi has actually been named as a possible member of a PLO government in exile.[5]

---

3 *Washington Post,* March 13, 1978.

4 *Washington Post,* August 2, 1978.

5 Sharabi held a chair of Arab studies at Georetown University during 1977-78, which was financed by a $750,000 grant from Libya. Sharabi referred to Reverend Timothy S. Healy, the president of Georgetown University, as a Jesuit Zionist when Reverend Healy returned the $50,000 grant solicited by Sharabi and others from the Iraqi government.

The March 11 attack was not an isolated incident but was part of an overall plan designed by the PLO and Libya to wage a war of terror against unarmed Israeli civilians. In so doing, the PLO and Libya contemplated committing the act of genocide against the population of Israel. The March 11 attack was part of this act of genocide. All of the supporters of the PLO, including the American based defendants herein, knew that these were the objectives of the PLO at the time of and prior to the March attack.[6]

Prior to the March attack, the PLO had engaged in terrorist raids on hospitals, nurseries and school buses; bombed crowded marketplaces and other areas where large numbers of the civilian population congregated; and otherwise had directed barbaric attacks against purely civilian populations in highly populated areas of Israel. The PLO had claimed responsibility for scores of such attacks. In addition, the PLO, together with Libya, on August 11, 1976, carried out a criminal attack against passengers of an El Al plane in the Istanbul International Airport, killing four passengers and injuring twenty-one; planned and carried out the massacre of Israeli athletes during the Munich Olympics in 1972; on August 5, 1973, engaged in an indiscriminate massacre at Athens Airport of passengers who had departed from a TWA plane which had arrived from Israel; and had conducted the infamous attack on civilian passengers at Lod International Airport in Israel.

The Palestine covenant and the resolutions of the Palestine National Council, the governing body of the PLO,

---

[6] It is the position of the plaintiffs that the Palestine Congress of North America ("PCNA") is responsible for the actions and knowledge of the various groups which formed and now compose the Congress. A list of these groups is included as Appendix B.

make it very clear that it is the objective and aim of the PLO to conduct indiscriminate terror attacks on unarmed civilians in Israel and to engage in the act of genocide against the population of Israel. Yasar Arafat, head of the PLO, has stated many times, "Peace for us means the destruction of Israel . . . Revolutionary violence is the only means for the liberation of the land of our fathers. The goal of that violence is the destruction of Zionism in all its political, economic and military forms and its expulsion from Palestine." Sami al-Atari, secretary for the PLO central committee, on March 7, 1978 reiterated the PLO purpose, "self-determination for the Palestinian people is identical with the destruction of Israel."[7]

The United States, of course, is directly affected by and has a direct interest in any concerted effort to commit crimes against mankind and to commit the act of genocide against the people of any friendly nation. In that regard, the United States and its laws, as a member of the civilized community of nations, has (sic) been directly affected by and has (sic) a direct interest in the March 11 barbaric attack.

The interest of the United States in the March 11 attack is even more pronounced. One of the primary purposes of the attack was to sabotage the foreign relations of the United States and its negotiations by destroying the

---

[7] President Ronald Reagan in response to a question whether he would brand the PLO as a terrorist organization, responded, "I have no hesitation in doing so. We live in a world in which any band of thugs clever enough to get the word 'liberation' into its name can thereupon murder school children and have its deeds considered glamorous and glorious. Terrorists are not guerillas or commandoes or freedom fighters or anything else. They are terrorists and they should be identified as such." *Human Events*, December 13, 1980.

positive efforts made in the Camp David accords. It was the intent of the PLO and Libya to conduct such a barbaric attack that would mandate a response by Israel against the Palestine guerrilla bases in southern Lebanon, thus setting off a chain of events which would create a climate making it impossible for any Arab government to negotiate with Israel or for that matter, with the United States. This is in part documented by the statements of the PLO itself and also in part by the increased number of terrorist actions within Israel during 1978.

In mid-February of 1978, the PLO set off a time bomb in a crowded Jerusalem bus, killing two persons and injuring forty-six. In August of that year, there were twenty-three bomb incidents in populated areas of Israel. On September 30, a PLO ship, loaded with explosives, set out for the seaside resort of Eilat, which at that time was filled with tens of thousands of persons celebrating the Jewish New Year. The ship was mounted with 42 Katyuska rockets and had four tons of dynamite aboard. The objective of the mission was to set ablaze with the rockets a huge oil dump on the outskirts of Eilat, set the ship's automatic pilot straight for the crowded beach, and cause the deaths of thousands of vacationers. Such a halocaust might actually have taken place but for the interception of the ship by an Israeli gunboat.[8]

The interest of the United States in and its involvement with the March 11 massacre goes even deeper. Libya, prior to this terrorist attack, obtained from within the United States sophisticated terrorist arms and equipment

---

[8] *The Terror Network,* Claire Sterling, Holt, Reinhart and Winston (1981) at p. 280.

and recruited ex-United States Green Beret and CIA instructors, all for the purpose of assisting the PLO in its terror campaign against the Israeli civilian population. As part of this program, Libya contracted with fugitive Francis Terpil, a citizen of the United States, to organize a network in the United States to illegally obtain explosive devices, arms and terrorist instructors. Thousands of machine guns, missiles and explosive devices were obtained for the PLO by Francis Terpil with the aid of certain American based groups in sympathy with the PLO. In addition, Terpil recruited a team of American clandestine operatives, paramilitary specialists, professional killers and explosive experts trained by the CIA and the United States special forces to conduct terror training for PLO operatives.[9]

Much of the arms and equipment used by the terrorists in the March 11 attack were obtained by the PLO through Libya in this manner. The recruited team of American clandestine operatives trained in Libya the PLO instructors who in turn trained the very terrorists who conducted the attack on the plaintiffs herein.

Prior to the March 11 attack, the PLO was directly involved in raising funds within the United States in support of its terrorist campaigns. Representatives of the PLO attended meetings of American-based groups sympathetic with the objectives and operations of the PLO for the purpose of soliciting an independent base of funds. Indicative of these efforts is a letter written on the stationery of the PLO's United Nations office and signed by Jacob Oubedi, the PLO's top fund raiser, thanking the Palestine

---

[9] See the criminal indictment of Francis E. Terpil and others, which is Appendix C.

committee in the State of Virginia for the money it had raised for the benefit of the PLO operations.[10] The letter indicates that the money had been turned over to him by the PLO director in New York, Zoher Tarazi. The same Mr. Tarazi has acknowledged in 1976 that Oubedi was in the United States for the purpose of raising funds for the operations of the PLO.[11]

With the knowledge of the aims, objectives and terrorist activities of the PLO, the NAAA and the groups now composing the PCNA, funded, assisted in the funding, assisted the obtaining of arms, ratified, encouraged, apologized for and otherwise acted in furtherance of the PLO and Libyan plot to reap terror upon the civilian populations of Israel. These efforts culminated in the March 11 massacre, which was the worst terrorist attack in the history of Israel. In light of their actions in support of this terror campaign, the plaintiffs allege that the NAAA and the PNCA are legally responsible for having planned and conspired to commit this campaign of terror, including the March 11 attack.[12]

Sharabi, from its inception, has been a leader of and an influential spokesman for the NAAA. In 1972, in dis-

---

10 See the letter from Jacob Oubedi which is Appendix D.

11 See the column of Jack Anderson dated September 20, 1976, which is Appendix E.

12 The Palestine Information Office ("PIO") is the agent and alter ego of the PLO, and is responsible for all the actions of the PLO within and without the United States. See Appendix F, which is the Supplemental Registration Statement of the PIO filed with the Department of Justice for the six-month period ending October 24, 1979 and Appendix G, which is the Report of the Attorney-General concerning the Foreign Agents Registration Act for the calendar year 1979.

cussing the so-called imperatives of the Palestine Revolution in the introduction to a book entitled *Palestine Lives: Interviews with Leaders of the Resistance.* Sharabi made the following statement: "The fourth imperative is to keep alive an active Palestinian resistance. It is primarily the *organized violence* of the oppressed Palestinians which is able to achieve the above imperatives in creating a libeeration movement. Armed struggle is the condition for organizing the people, for carrying out political struggle, for keeping the fires of liberation burning." [Emphasis added]

During 1972, in a PLO publication entitled *Shuon Falastiniyeh,* Sharabi wrote,

> No settlement can be realized between Zionism and the Palestinian movement except by one of two ways: the dissolution of the Palestinian people, or the dissolution of the Zionist structure. The destruction of the Zionist structure is not only logical but inevitable. It is the *organized Palestinian violence* which can realize the Palestinian's claims and create a successful liberation movement. The armed struggle is the condition for organizing the people for the political struggle and for preserving the flame of liberation. [Emphasis added].

These are the real aims and objectives of the NAAA, as stated by its leading spokesman. It is not surprising that they are virtually identical to the aims and objectives of the PLO, since Sharabi is also one of the leading spokesmen for the PLO throughout the world.

The NAAA in its Memorandum attempts to obtain considerable mileage from its March 15, 1978 press release attached as its Appendix G. In the first place, the statement hardly contains a strong condemnation of the bar-

baric actions of the PLO on March 11. While the statements against Israel's actions in Lebanon are clear and unequivocal, the statements relating to "the attack on an Israeli bus March 11" are equivocal and hardly dramatic. The real intent and message of the NAAA, however, can be ascertained by comparing the purely public relations release of March 15, 1978 with the statement of the NAAA circulated by President Baroody to its members on March 21, 1978. Neither that statement nor its accompanying letter mention any condemnation of the PLO attack of March 11, although it discusses the same actions of Israel in Lebanon discussed in the press release of March 15, 1978.[13] The statement of the NAAA to its members constitutes the true position of the NAAA.

The PCNA was formed by and is composed of several national groups who are sympathetic with and support the PLO. Four of those groups, the Palestine Arab Fund ("PAF"), the American Federation of Ramallah Palestine, Committee for Democratic Palestine and the United Holy Land Friends, are permanently represented on the executive committee of the PCNA and constitute a significant portion of that committee. The PCNA is responsible for the prior actions of the groups which formed and now constitute the PCNA, particularly those four groups which compose the executive committee. These four groups, together with other affiliated groups, raised funds for the terrorist actions of the PLO prior to March 11, 1978, and otherwise acted in furtherance of the PLO terrorist attacks.

---

[13] See the letter and Statement of Baroody to the members of the NAAA, which is Appendix H.

The PAF has been designated by El Fatah as its authorized agent for all financial activities in the western United States. At the PAF convention in Albuquerque in September, 1978, a greeting book carried ads from various Arab groups, calling for "Death of Zionists everywhere" and had many appeals to violence. PAF mailings asking for contributions regularly list recent terrorist attacks carried out by the PLO, the number of Israeli casualties and the amounts of damage caused—all in an attempt to stimulate further donations. During the year 1977, the PAF, according to its financial statement issued at the 1978 meeting, forwarded to the PLO $160,000 to support the PLO terrorist operations. Prior to March 1978, the United Holy Land Friends, utilizing similar methods, raised considerably larger sums for the PLO terrorist activities.[14]

Dr. Tony Sayegh, who acts as the PAF's official spokesman in the United States, has stated that the PAF approves of Palestinian terrorist attacks in the Middle East, even when aimed at American or European tourists.[15]

The NAAA works in close cooperation with the PCNA and its subsidiary groups. Many of the active members and leaders of the NAAA are and have been leaders in the PCNA and/or its subsidiary groups.

II. ALLEGATIONS IN THE COMPLAINT ARE SUFFICIENT TO OVERCOME A JURISDICTIONAL ATTACK PREMISED ON A FACTUAL BASIS

---

14 *The PLO Underground in California,* Ehud Young, *New West* (Feb. 26, 1979), p. 24, and the *San Diego Union,* April 20, 1979.

15 Ibid.

For the purposes of determining jurisdiction under 28 U.S.C. 1331 and/or 1350, the allegations of fact set out by the plaintiffs in the complaints and further amplified in this Memorandum must be accepted by this Court as true and given all the reasonable inferences to which they are entitled. *Watkins v. Wilson,* 425 F.Supp. 166 (D.C. 1977); *Hartigh v. Latin,* 158 U.S. App. D.C. 289, 485 F.2d 1068 (1973), *cert. denied* sub nom: *District of Columbia v. Marsh,* 415 U.S. 948 (1974). In opposing a motion to dismiss the complaint for lack of subject matter jurisdiction under § 1331 or 1350, the plaintiffs do not have a duty and are under no obligation to substantiate the allegations in the complaint, particularly when the discovery process has not yet even begun. A motion to dismiss for lack of jurisdiction must be considered in light of the allegations in the complaint and can only be sustained if those allegations as pled do not give rise to a cause of action over which the Court has jurisdiction.[16]

III. THE TORTS ALLEGED IN THE COMPLAINT ARE PROPERLY CHARACTERIZED AS TORTS IN VIOLATION OF THE LAW OF NATIONS, TORTS IN VIOLATION OF THE TREATIES OF THE UNITED STATES, AND TORTS IN VIOLATION OF THE LAWS OF THE UNITED STATES; MORE SPECIFICALLY, THEY ARE THE INTERNATIONALLY RECOGNIZED TORTS OF TOR-

---

16 The only "evidence" submitted by the NAAA in opposition to the allegations of the complaint is a self-serving affidavit of former president Baroody, the same individual who released contradictory statements to the press and to the members of NAAA. This self-serving affidavit has no probative value and certainly Mr. Baroody would be subject to deposition concerning the statements made therein.

TURE, TERROR, HOSTAGE-TAKING, AND GENOCIDE.

The NAAA, throughout its Memorandum, has attempted to characterize the actions of the PLO terrorists against the plaintiffs as constituting solely the simple torts of assault, battery and false imprisonment. The plaintiffs do no dispute that they were assaulted, battered and falsely imprisoned, among other tortious actions. But to characterize the conduct of the PLO terrorists as suggested by NAAA is to ignore the reality of the circumstances confronted by the surviving plaintiffs and the decedents.

The actions of the PLO terrorists went well beyond assault, battery and false imprisonment. They were barbaric and inhumane almost beyond description. These actions constitute crimes of the most hideous nature against the plaintiffs and also against mankind. The conduct of the terrorists violate the basic premise of civilized existence. Such conduct has been universally condemned by the civilized world in treaties and declarations.

As such, the tortious conduct committed against the plaintiffs rises above the simple torts of assault, battery and false imprisonment, and become torts in violation of the law of nations and also torts in violation of the treaties of the United States and the laws of the United States.[17]

The concept that certain tortious actions and certain criminal actions when committed in the context of a campaign of terror become torts and crimes of a higher and

---

[17] See *Federal Jurisdiction of International Human Rights Claims: the Alien Tort Claims Act after Filartiga v. Pena-Irala*, Harvard International Law Journal, Vol. 22 No. 1 (Winter, 1981).

different order has been recognized by the Inter-American Juridical Committee of the Organization of American States, and the General Assembly of that organization. The General Assembly, as early as 1970, took the position that acts of violence constituting serious violations of human rights are crimes against humanity and thus of a higher and distinct order, in addition to being common crimes and torts.

When the crime and tort becomes a crime against humanity, and thus an offense against the international community and fundamental human rights, a new and distinct tort and crime has been committed by the terrorist perpetrators. The atrocious and barbaric nature of these terrorist acts has caused them traditionally to be regarded as *delicta juris gentium*.[18] This is a recognition by traditional international law that these kinds of actions constitute a distinct and more reprehensible conduct than common crimes or torts.[19]

The Inter-American Juridical Committee of the OAS in its Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of

---

[18] See *United States v. Pirates*, 18 US (Wheat.) 184 (1820); *United States v. Klintock*, 18 US (Wheat.) 144 (1820); *United States v. The La Jeune*, 26 F.Cas. 15,551 (Cir. Mass. 1822).

[19] See Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Inter-American Juridical Committee, October, 1970.

Extortion offered the following concept of the crime of terrorism:

> Crimes identified as crimes of terrorism are not ones that do not previously exist and that have risen as new forms of crimes. They are same class of crimes such as murder, arson, use or storage of explosives, contamination of water, and the interruption of all kinds of communications media. What is new is that, for some time, certain organizations have been formed that prepare and execute such crimes with deliberate intention of causing panic, disorder, and terror within an organized society, in order to destroy social discipline, paralyze the forces of reaction of a society and increase the misery and suffering of the community.

The Committee went on to state that the crime of terrorism is a new and distinct crime because it combines the classic crimes with attacks equally upon the individual, the society in which he lives, the state to which he belongs, and the international community of which he forms a part. The object of the crime is to produce terror or intimidation that creates a common threat to life, health, physical integrity and freedom of persons.

The statements of the Inter-American Juridical Committee are equally applicable to the torts committed against the plaintiffs by the PLO terrorists. The terrorists combine the classic torts of assault, battery, false imprisonment, infliction of mental distress and infliction of cruel and inhuman treatment with an attack upon the individual, the society of Israel, and the international community. The purpose and objective of the actions of the terrorists was to produce terror and intimidation and to create among the civilian population of Israel a common threat to life, health, physical integrity and freedom of persons. Consequently, the actions of the terrorists can-

not be described as simply common law torts, but they are in addition torts of a distinctive and higher nature, torts in violation of the laws of nations and the civilized world.

The United States Court of Appeals for the District of Columbia in *Payne v. Government of the District of Columbia, et al.*, 182 U.S. App. DC 188, 559 F.2d 809 (1977) recognized that tortious actions against an individual under certain circumstances (in that case by officers acting under color of law) can create concurrent torts of different kinds and natures. Adopting the holding of the United States Court of Appeals for the District of Columbia in the *Payne* case, the plaintiffs herein are litigating against the defendants concurrent and distinct torts, torts in violation of the law of nations, in violation of the treaties of the United States, and in violation of the laws of the United States; more specifically designated as torture, terror, hostage-taking and genocide.

IV. ACTS IN FURTHERANCE OF TORTIOUS CONDUCT ARE ACTIONABLE TORTS

Parties, such as the NAAA and the subsidiary groups of the PCNA, who act in furtherance of tortious conduct and conspire to commit such tortious conduct are liable for the torts committed against the plaintiffs even if they did not directly perform the physical acts inflicting the injury upon the plaintiffs.

All that is necessary for the NAAA to be liable herein is that the NAAA shared the general objectives of the PLO and assisted the PLO in furtherance of the terrorist campaign. In order for the NAAA to be liable herein, there need not be an express agreement between the PLO and the NAAA, nor need the NAAA know all the details of the plan designed to achieve the objectives, or even possess

the same motives for desiring the intended result. *Hampton v. Hanrahan,* 600 F.2d 600 (6th Cir. 1979). See *Fenslage v. Dawkins,* 629 F.2d 1107 (5th Cir. 1980); *El Ranco, Inc. v. First National Bank of Nevada,* 406 F.2d 1205 (9th Cir. 1968); *Scott v. Moore,* 461 F.Supp. 224 (E.D. Tex. 1978).

The actions of the NAAA as alleged in the complaint are sufficient to render the NAAA liable for all injuries sustained by the plaintiffs and constitute actionable torts in furtherance of the tortious attack of the PLO.

The Restatement Second of the Law of Torts, supports the conclusion that the NAAA is liable for its actions in furtherance of the tortious conduct of the PLO, even if the NAAA did not directly perform the physical acts inflicting harm and injury upon the plaintiffs. Section 876, entitled "Persons Acting in Concert" provides as follows:

> For harm resulting to a person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."

Section 877, entitled "Directing or Permitting Conduct of Another" provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) orders or induces the conduct,
>
> (b) if he knows or should know of circumstances that would make the conduct tortious, if they were his own, or

(c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously.

Under either Section 876 or 877, the allegations of the plaintiff against the NAAA are more than sufficient to render NAAA liable for all the injuries by the plaintiffs.

V. THIS COURT HAS JURISDICTION OVER THE CAUSES OF ACTIONS AGAINST THE NAAA BROUGHT BY ALL PLAINTIFFS PURSUANT TO 28 U.S.C. § 1331 AS THEY ARISE UNDER THE LAWS OF NATIONS AND THUS THE LAWS OF THE UNITED STATES[20]

A. THE TORTIOUS CONDUCT OF THE PLO TERRORISTS IS IN VIOLATION OF THE LAW OF NATIONS.

The PLO terrorists committed the torts of terror, torture, hostage-taking and genocide against the plaintiffs. Each of these torts are in violation of and actionable under the laws of nations.

The laws of nations is (sic) ascertained by consulting international agreements, international custom, general principles of law recognized by civilized nations, judicial decisions recognizing and enforcing that law, and the teachings of learned commentators. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *The Paquete Habana*, 175 U.S. 677 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). See also, Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (effective October 24, 1945).

---

[20] It is noted that NAAA in its Memorandum did not even address this most important and dispositive issue.

These sources are abundantly clear that mass terrorizing of unarmed populations with the intent to murder and mutilate is contrary to and actionable under the law of nations. Such actions are construed by the law of nations to be crimes against humanity and are universally condemned by civilized law. Such terrorist acts violate fundamental human rights, the core rights upon which civilized nations exist, and thus are among those core violations of the law of nations which give rise to actionable torts.[21] See Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala,* supra.

The United States in September, 1972, tendered to the General Assembly of the United Nations a Draft Convention For The Prevention and Punishment of Certain Acts of International Terrorism. In that document, the United States, after stating that civilians must be protected from terrorist acts, represented the law of nations to be as follows:

> Any person who unlawfully kills, causes serious bodily harm or kidnaps another person, attempts to commit any such act, or participates as an accomplice of a person who commits or attempts to commit any such act, commits an offense of international significance if the act
>
> (a) is committed or takes effect outside the territory of a state of which the alleged offender is a national; and
>
> (b) is committed or takes effect

---

[21] The same is equally true of the torts of torture, hostage-taking and genocide.

(i) outside the territory of the state against which the act is directed

(c) is committed neither by nor against a member of the armed forces of a state in the course of military hostilities and

(d) is intended to damage the interests of or obtain concessions from a state or international organization.

Acts of terror, such as committed by the PLO members against the plaintiffs, are directly prohibited by many international agreements, including the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention on the Suppression of Terrorism, the Geneva Convention for the Protection of Civilian Persons in Time of War (August 12, 1949), the Geneva Convention for the Prevention and Punishment of Terrorism (November 16, 1937), the Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) (1959), the Principles of the Law of Nations Against Committing Terrorism on Civilian Populations Pronounced in General Assembly Resolution 2444 (XXIII) (1968), the Convention to Prevent and Punish Acts of Terrorism (February 2, 1971) of the Organization of American States and other acts, declarations and resolutions of international bodies.[22]

---

[22] The fact that some of these document may not have been ratified or may not constitute treaties is totally irrelevant to the question as to what is the law of nations with regard to terror, torture, hostage-taking and/or genocide. See *Filartega v. Pena-Irala*, supra.

Protocol 1 to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted by the conference on June 8, 1977) is an extremely authoritative source to determine the law of nations as relating to terrorism in March, 1978. Article 51 of Protocol 1, entitled "Protection of Civilian Populations", provides as follows:

> (1) The civilian population and individual civilans shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules which are additional to other applicable rules of international law shall be observed in all circumstances.
>
> (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian populations are prohibited.

The essence of Article 51 of Protocol 1 is to prohibit deliberate attacks on civilian populations, and acts or threats of violence of which the main aim is to terrorize the population by indiscriminate attacks. See *New Code for the Protection of Civilian Populations and Property During Armed Conflict,* Ionel Closca, International Review of the Red Cross, November-December, 1980. There simply can be no question that the PLO terrorists did exactly what is prohibited by the law of nations as documented by Article 51 of Protocol 1 to the Geneva Conventions of 12 August 1949.

The extent to which the commission of indiscriminate terror on civilian populations is prohibited by the law of nations and condemned by the laws of the United States is set out with clarity by President Richard M.

Nixon in 1972 when he established the Cabinet Committee to Combat Terrorism. At that time, President Nixon said as follows:

> The use of terror is indefensible. It eliminates in one stroke those safeguards of civilization which mankind has painstakingly erected over the centuries.
>
> But terror threatens more than the lives of the innocent. It threatens the very principles upon which nations are founded. In this sense every nation in the United Nations, whatever its ideological assumptions, whoever its adversaries, wherever its sympathies, is united with every other nation by the common danger to the sovereignty of each.[23]

These same international documents establish that torturing unarmed civilians, holding such civilians hostage for extortion and committing acts of genocide are similarly in violation of and actionable under the law of nations.

Article 5 of the Universal Declaration of Human Rights provides: "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Article 3 of the Geneva Convention of 12 August 1949 Relating to the Protection of War Victims, states

---

[23] For further evidence that indiscriminate terrorism against civilian populations violates the law of nations and is actionable under the law of nations, see *In Re Extradition of Ziyad Abu Eain*, N.D. Ill. 1979; *International Terrorism and Political Crimes*, M. Cherif Bassiouni, Charles C. Thomas (1975); Statement of Reasons for the Draft Convention on Terrorism and Kidnapping of Persons for Purposes of Extortion, Inter-American Juridical Committee (October, 1970).

that the following acts "are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [persons taking no active part in hostilities]: (a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment."

The Convention on the Prevention and Punishment of the Crime of Genocide declares that genocide, whether committed in time of peace or in time of war, is a crime under international law. It defines genocide to mean, among other actions, the deliberate inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. This is, of course, exactly what Libya and the PLO are attempting to do to the civilian population of Israel through terrorist actions such as the March 11 massacre.

The United Nations 1975 Declaration on the Protection of All Persons From Being Subject to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment is further evidence that the law of nations prohibits the cruel and barbaric actions of the PLO terrorists. Article II of that Declaration provides:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

The United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala,* supra, directly held

that torture was in violation of and actionable under the law of nations. The authorities cited in the Second Circuit decision, coupled with the reasoning in that opinion, necessitate a conclusion that torture, terror, hostage-taking, and acts of genocide are likewise in violation of and actionable under the law of nations. The decision of the Second Circuit is consistent with and supported by several decisions of the International Court of Justice, which confirm the existence of the customary international law of human rights and causes of action for violating such law of human rights.[24]

There is universal consensus that terror, torture, taking of hostages and the act of genocide are in violation of and actionable under the laws of nations. Many other authorities could be cited if space permitted. But in view of the fact NAAA did not even argue the point, plaintiffs assume that the authorities cited in the Memorandum are more than sufficient to establish this principle of universal acceptance.[25]

---

[24] *Nuclear tests (Australia v. France)*, Judgment of December 20, 1974 [1974] ICJ 253; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Counsel Resolution 276* (1970) [1971] ICJ 16.

[25] For further support of this principle, see Statement by United States Representative Robert Rosenstock, Legal Affairs Advisor to the United States Mission to the United Nations, entitled, "United States Supports Establishment of a U.N. Ad Hoc Committee on Drafting of Convention Against Taking of Hostages", Department of State Bulletin, January 24, 1970, page 72; Statement by United States Representative Monroe Leigh, Legal Advisor of the Department of State, entitled, "U.S. Calls for Responsible Measures Against International Terrorism," Department of State Bulletin, January 24, 1977, page 75; Statement by Ambassador Myerson, entitled, "U.S. Supports U.N. Resolution Against the Practice of Torture," Department of State Bulletin, January 24, 1977, page 77.

B. THE LAW OF NATIONS IS PART OF THE FEDERAL COMMON LAW.

The law of nations forms an integral part of the federal common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. *Filartiga v. Pena-Irala,* supra.

The Supreme Court of the United States in *The Paquete Habana,* supra, 175 U.S. at 700, stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination". This holding by the Supreme Court was consistent with and was supported by prior holdings of the United States Supreme Court in *The Nereide,* 13 U.S. (9 Cranch.) 388 (1815) and *The United States v. Smith,* supra, which proclaimed that the law of nations was part of the federal common law and was to be ascertained and administered by the federal courts.

Both the majority opinion and the dissenting opinion in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), stated that the law of nations was part of the federal common law and was to be administered by the federal courts. Justice White, in his dissenting opinion at page 450, states the principle most eloquently:

> I start with what I thought to be unassailable propositions: that our courts are obliged to determine controversies on their merits, in accordances with the applicable law; and that part of the law American courts are bound to administer is international law. . . . . The doctrine that the law of nations is a part of

> the law of the land, originally formulated in England and brought to America as part of our legal heritage, is reflected in the debates during the Constitutional Convention and in the Constitution itself. This Court has time and time again effectuated the clear understanding of the Framers, as embodied in the Constitution, by applying the law of nations to resolve cases in controversies. . . . Principles of international law have been applied in our courts to resolve controversies, not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof. Fundamental fairness to litigants as well as the interest in stability of relationships and preservation of reasonable expectations call for their application whenever international law is controlling in a case or controversy.

There can be no question that in light of the torts committed by the PLO terrorists and the context in which those torts were committed, international law is controlling with regard to deciding the issues raised by the causes of action presented in the complaints of the plaintiffs.

When there is consensus concerning the particular area of international law and a particular area of international law involves principles relating to fundamental human rights and justice, the violation of that law of nations gives rise to tort actions under federal common law. See *Banco Nacional de Cuba v. Sabbatino,* supra, and *Filartega* (sic) *v. Pena-Irala,* supra.

C. TORTIOUS ACTIONS UNDER FEDERAL COMMON LAW ARISE UNDER THE LAWS OF THE UNITED STATES AS THAT PHRASE IS USED IN ARTICLE III OF THE CONSTITUTION AND IN 28 U.S.C. 1331.

The Supreme Court of the United States held in *Illinois v. City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972), in construing the Federal Water Pollution Control Act, that 28 U.S.C. 1331 jurisdiction supports claims founded upon federal common law as well as those of statutory law. The United States Court of Appeals for the District of Columbia has rendered a similar unequivocal ruling. In *Trans-Bay Engineers and Builders, Inc. v. Hills,* 179 U.S. App. D.C. 184, 551 F.2d 370 (1976), involving a question concerning the equitable obligations of the Secretary of HUD with regard to a certain contractor, Judge Leventhal recognized that the claim of equitable right was dependent on federal common law. With regard to jurisdiction under 28 U.S.C. 1331, federal question jurisdiction, he held at p. 377 as follows: "A claim 'arises under the laws of the United States' if the disposition of issues stated in the complaint requires application of federal common law." *Illinois v. City of Milwaukee,* 406 U.S. 991, 100, 92 S.Ct. 1385, 31 L.Ed. 2d 712 (1972). There is federal question jurisdiction under 28 U.S.C. 1331(a)."

In *Filartiga v. Pena-Irala,* supra, the plaintiff, a Paraguayan national, brought suit against a Paraguayan official for wrongfully causing the death of the plaintiff's son by the use of torture. The tortuous activity took place in Paraguay. The Second Circuit did not characterize the tortious allegations as simply alleging the common torts of assault, battery and false imprisonment. Instead, the court recognized that the torts committed against the deceased were of a higher order and constituted the internationally recognized tort of torture. The court ruled that the commission of this tort was in violation of and was actionable under the law of nations.

Adopting the holdings of the Supreme Court that the law of nations was part of the federal common law, the United States Court of Appeals for the Second Circuit in *Filartiga* held that such an allegation of torture was a case properly arising under the laws of the United States for Article III purposes since it was grounded upon the common law of the United States. While the court proceeded to find jurisdiction over the causes alleged therein pursuant to 28 U.S.C. 1350, the court recognized in footnote 22 that the reasoning of the opinion might also sustain jurisdiction under the general federal question provision, 28 U.S.C. 1331.

The case presented to the Court in *Filartiga* was actually a more difficult case than the case at bar with regard to jurisdiction under either 28 U.S.C. 1331 or 1350, since (a) there was no United States connection whatsoever for the tortious conduct, and (b) the actionable conduct involved relationships between a sovereign country and its own citizens. Given those extra difficulties, the holding of the Second Circuit in the *Filartiga* case is extremely persuasive authority for the conclusion that the causes of action alleged herein arise under the laws of the United States and that this Court has jurisdiction pursuant to 28 U.S.C. 1331.

VI. THIS COURT HAS JURISDICTION OVER THE CAUSES OF ACTION OF ALL ALIEN PLAINTIFFS AGAINST NAAA PURSUANT TO 28 U.S.C. 1350 BECAUSE THE TORTIOUS AC-

TIONS ARE IN VIOLATION OF THE LAW OF NATIONS[26]

28 U.S.C. 1350 provides "the District Court shall have original jurisdiction of any civil actions brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Previously in this Memorandum, we have delineated that the PLO terrorists committed the torts of terror, torture, hostage-taking and genocide against the surviving plainiffs and the decedents, and that NAAA was liable for the commission of those torts. In the previous section, we have demonstrated that the tortious actions of the PLO terrorists were in violation of the laws of nations, were crimes against humanity and were contrary to the fundamental core of human rights universally recognized by civilized nations. With regard to all of the alien plaintiffs in these two lawsuits, each of the jurisdictional requirements for bringing a cause of action under 28 U.S.C. 1350 has been satisfied.

The *Filartiga* case, which was discussed at length in the previous section of the Memorandum, is absolute authority for this Court having jurisdiction over the claims of all alien plaintiffs in the cases herein, pursuant to 28 U.S.C. 1350. It is not surprising that NAAA did not even mention, let alone discuss, the *Filartiga* case in this Memorandum.

---

[26] It is contended that this Court also has jurisdiction pursuant to 28 U.S.C. 1350 because the tortious actions were in violation of the treaties of the United States. The following section of this memorandum deals with the question of treaty violations with respect to 28 U.S.C. 1331 and will be relied upon, together with this section, to support jurisdiction pursuant to § 1350 with regard to violation of treaties of the United States.

The Second Circuit in the *Filartiga* case found that the torture of a civilian was in violation of the laws of nations and, as such, was a tortious action with (sic) the meaning of 28 U.S.C. 1350. The commission of terror, torture, hostage-taking and acts of genocide against the unarmed civilians in our circumstance, certainly is no less a violation of the law of nations and warrants equal recognition by this Court pursuant to § 1350. It is exactly the kind of inhuman and barbaric treatment of the plaintiffs herein which is most appropriate for litigation pursuant to § 1350, because they represent the most heinous kind of conduct against society and constitute universally condemned crimes against all of humanity.

The United States District Court for Maryland, in *Abdul-Rahman Omar Adra v. Clift,* 195 F. Supp. 857 (1961) rendered a decision which also supports the jurisdiction of this Court over all alien claims pursuant to § 1350. In that case, an action was brought by an alien for a judgment requiring the defendant to deliver plaintiff's daughter to his custody. The allegation therein was that the child had been improperly removed from the custody of the alien plaintiff. The Court held that it had jurisdiction pursuant to 28 U.S.C. 1350 to entertain the causes of actions brought by the plaintiff, under the theory that the actions of the defendant, as pled, were in violation of the law of nations. Adopting Hyde's International Law, Second Revision, 1945, Vol. I, Section 11(a), pp. 33-34, under the heading "The Relation of International Law to Private Individuals", the Court ruled that the commission of certain acts may be so detrimental to the welfare of the international society that the law requires the tortious offender to be held liable wherever he

may be found. The Court then concluded that such a principle was part of the laws of the United States and was evidenced by 28 U.S.C. 1350 itself.

There is no requirement that all the plaintiffs must be aliens in the lawsuits before this Court can have jurisdiction pursuant to 28 U.S.C. 1350. No authority for this proposition was cited by NAAA in its Memorandum. It really cannot be argued that this Court somehow loses jurisdiction pursuant to 28 U.S.C. 1350 because this Court has jurisdiction over the claims of United States plaintiffs pursuant to § 1331.

The constitutional basis for § 1331 and § 1350 is exactly the same, Article III. As *Filartiga* points out, The Alien Tort Statute, 28 U.S.C. 1350, does not grant new rights to aliens, nor does it create a new jurisdictional basis. It simply opens the federal courts to adjudication of rights by aliens under federal question jurisdiction for claims recognized by international law. The jurisdiction of this Court, pursuant to § 1331 and § 1350 therefore are the same. This jurisdictional basis is the violation of international law which creates a federal question because international law is part of the federal common law and the laws of the United States.

VII. THIS COURT HAS JURISDICTION OVER THE CAUSES OF ACTION OF ALL PLAINTIFFS AGAINST NAAA PURSUANT TO 28 U.S.C. 1331 AS THEY ARISE UNDER THE TREATIES OF THE UNITED STATES

All of the plaintiffs have causes of action arising under the enumerated treaties. These treaties, when considered in the context of their purpose, are the kinds of

treaties which give rise to private causes of action. The interpretation and administration of these treaties presents a pivotal, substantive issue, the determination of which will have a direct impact on the plaintiffs' success or failure and involve construction of the treaties of the United States, which constitute laws of the United States. The sections of the treaties relied on are primarily of a judicial nature, can be interpreted by judicial tribunal, and confer rights upon individual citizens. The apparatus for effectuating the rights conferred by these treaties already exist in the judicial system of the United States and no new mechanisms need be enacted in order for the courts to enforce those rights.

The ratification of a treaty by the United States makes it the law of the United States. No legislation is necessary to give it the effect of law. This principle was confirmed by the United States Supreme Court in *Asakura v. City of Seattle,* 265 U.S. 332 (1924), in which the Court states at p. 341: "It [a treaty] stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." The same holding was reached by the United States Supreme Court later, in *Bacardi Corporation v. Domenech,* 311 U.S. 150 (1940). See also, *United States v. A. L. Burbank and Company, Ltd.,* 525 F.2d 9 (2d Cir. 1975).

The test as to when treaties confer private rights on citizens of the United States was structured by the United States Supreme Court in *Head Money Cases,* 112 U.S. 580 (1884). The ruling in this case has been the fundamental

basis utilized by federal courts to consider the question of private rights created by treaties. The Court held as follows:

> . . . a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land'. A treaty, then, is the law of the land as an act of Congress is, whenever its provisions proscribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision for the case before it as it would to a statute.

An examination of the treaties cited by the plaintiffs demonstrates (a) that they confer certain rights on individuals; (b) that these rights partake of the nature of municipal law; and (c) they are capable of being enforced as between private parties in the courts of this country without the enactment of any new legislation. Consequently, these treaties, pursuant to the ruling of the Supreme Court in *The Head Money Cases,* give rise to private causes of action and those causes of action are to be enforced in the federal courts.

An instructive case concerning the existence of private rights pursuant to the kind of treaties enumerated by the plaintiffs is *The People of Saipan v. United States De-*

partment of Interior, 502 F.2d 90 (9th Cir. 1974). The plaintiffs in the *Saipan* case claimed they had a private right of action based on the Trusteeship Agreement pursuant to which the United States was authorized to administer the territory of Micronesia. The court found that the plaintiffs indeed had a private right of action pursuant to that Agreement and more specifically, pursuant to the section of the Agreement which provided that the United States was required to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end . . . regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources . . ." On the basis of this language and this language alone, and without any enabling legislation, the Ninth Circuit reached this conclusion.

The Court in the *Saipan* case held at p. 97 that

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation, must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non self-execution.

Relying on the test just quoted, the Court in *Saipan* held that the preponderance of features in the Trusteeship Agreement suggest the intention to establish direct affirmative and judicially enforceable rights.

> The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in

> the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic forum; and the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make the rights virtually enforceable. 502 F.2d at p. 97.

Utilizing the test formulated by the Ninth Circuit, it would seem abundantly clear that the treaties relied upon by the plaintiffs create private rights of action against the defendants in this case, including NAAA. The conferring of basic human rights, the freedom from torture, terror, being taken as a hostage and genocide, would seem to be even more appropriate for judicial enforcement than issues involving the local economy and the environment.

It is interesting to note that the cases cited by NAAA in its Memorandum do not necessitate or even suggest a contrary conclusion. In *Diggs v. Richardson,* 180 U.S. App. D.C. 376, 555 F.2d 848 (1976), the United States Court of Appeals for the District of Columbia was called upon to determine whether a United Nations Security Council resolution calling upon member states not to have any dealings with South Africa, created private rights of action. Firstly, it should be noted that the Court of Appeals did not throw out the cause of action because it relied on a United Nations Security Council resolution, but instead, went ahead to examine the nature of that resolution to determine the possible rights of the plaintiffs. Therefore, the Court of Appeals must have concluded that private rights of action can be premised upon United Nations Security Council resolutions.

Secondly, the nature of the resolution under consideration in Diggs was clearly geared to foreign relations of countries and not to judicially enforceable rights. Judge Leventhal in the opinion so found. Judge Leventhal, in reaching his opinion, adopted with approval the ruling of the Supreme Court in *The Head Money Cases* discussed above. The Court held at p. 851:

> Applying this kind of analysis [*The Head Money Cases* analysis] to the particular Security Council Resolution on which plaintiffs rely, we find that the provisions here in issue were not addressed to the judicial branch of our government. They do not by their terms confer rights on individual citizens; they call upon governments to take certain actions.

Applying the test developed by Judge Leventhal and employing *The Head Money Cases* analysis, the contrary conclusion would be reached with regard to the treaties relied on by the plaintiffs. Consequently, these treaties create a private right of action on behalf of the plaintiffs.[27]

The NAAA, in its Memorandum, has relied upon *Huynh Thi Anh v. Levi,* 586 F.2d 625 (6th Cir. 1978) to support its proposition that the Geneva Convention Relative to Protection of Civilian Persons in Time of War, does not give rise to a cause of action with regard to the tortious

---

[27] The decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Postal,* 589 F.2d 862 (1979), also is not contrary to the conclusion that the plaintiffs herein have private rights of action under the enumerated treaties. In that case, the Court pointed out that in order for the treaty to have any impact whatsoever, Congress would have had to provide monetary funds for its implementation. There is not such congressional impediment in our cases to finding a private right of action under the treaties.

conduct alleged in our complaints. A reading of that case quickly indicates that it does not stand for that proposition at all. What the court did say was that Articles 24 and 49 of that Convention relating to education of children separated from parents by war did not give rise to a private cause of action because *that language* was vague, very general, and "does not answer the custody question presented by this case." In no way did the Sixth Circuit hold that the Convention could not under appropriate circumstances give rise to a private cause of action.

An examination of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, indicates that its essential purpose is directed to protecting the rights of persons who are of a civilian nature. It confers individual rights on such persons. It describes in detail that these individuals are to be free from acts of torture, terror, hostage-taking and genocide. The rights given to individuals are clear, enforceable and unmistakable. They are enforceable in United States courts without the enactment of any new legislation and without the Congress providing any additional funds.

The NAAA, in its Memorandum, went through a cursory discussion of the other treaties relied on by the plaintiffs. There are many misstatements in those discussions, for example, the United States is a signatory to the American Convention on Human Rights. We have already seen that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War creates private rights of action which are enforceable and should be enforced in this Court. Since only one treaty is necessary to sustain jurisdiction, we will only highlight a few additional treaties as illustrative of the overall principle.

The Second Circuit in the *Filartiga* case, commented upon the significance of the Universal Declaration of Human Rights. The Court commented that the Declaration no "longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement' but is rather an authoritative statement of the international community." 630 F.2d at 883.

As such, in applying the rationale of Judge Leventhal in the *Diggs* case, the Universal Declaration of Human Rights should be construed as creating private rights enforceable by this Court. It unquestionably confers individual rights and defines fundamental freedoms capable of being enforced by a judicial tribunal. Those rights are not inconsistent with, and in fact, are parallel to, our own Bill of Rights. To permit a private right of action under the Universal Declaration of Human Rights would do nothing more than permit the principles of our Bill of Rights to be utilized in cases involving aliens and actions outside of the United States. Such an application of fundamental human rights law is exactly what is mandated by the United States incorporating international law into its federal common law, as is evidenced by the language of 28 U.S.C. 1350.[28]

---

[28] The United States District Court for the Northern District of Illinois, in *The United States v. Steinberg*, 478 F.Supp. 29 (1979), held, "the United Nations Charter, a treaty ratified by the United States, is a part of the supreme law of the land. *Balfour, Guthrie & Company v. United States*, 90 F.Supp. 831 (N.D. Cal. 1950)." As such, the Charter also would give rise to a private cause of action on behalf of the plaintiffs in this case since it too, confers individual rights capable of judicial enforcement.

Where a complaint is drawn so as to claim a right to recovery under the laws or treaties of the United States, the federal court has subject matter jurisdiction unless the federal question alleged is immaterial or wholly insubstantial and frivolous. *Hartigh v. Latin,* supra. If there is any foundation or possibility to the claim of federal question jurisdiction, then the Court is to deny a motion to dismiss on the basis of lack of federal question jurisdiction. *Payne v. Government of the District of Columbia,* supra. These holdings of the United States Court of Appeals for the District of Columbia are consistent with the pronouncement of the Supreme Court in *Duke Pawer Company v. Carolina Environmental Study Group, Inc., et al.,* 438 U.S. 59 (1973), when the court held, "For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellee's claims, it is not necessary to decide whether appellee's alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action 'on which [appellee's] can actually recover'. *Bell v. Hood,* 327 U.S. 678, 682 (1946). Instead the test is whether 'the cause of action alleged is so *patently without merit* as to justify . . . the court's dismissal for want of jurisdiction.' "

Certainly, it cannot be said that the assertion of federal subject matter jurisdiction based on the treaties enumerated by the plaintiffs is so patently without merit, is so immaterial and so insubstantial as to warrant dismissal.[29]

---

[29] Since the plaintiffs believe the arguments already advanced are dispositive of defendant's Motion of Dismiss, they address summarily herein their private causes of action under the enumerated statutes of the United States. This Court has jurisdiction over the causes of action of all plaintiffs

(Continued on next page)

VIII. THE COMPLAINTS OF PLAINTIFFS WERE FILED WITHIN THE APPLICABLE LIMITATIONS PERIOD

A. PLAINTIFFS' CAUSES OF ACTION IN COUNTS II THROUGH V OF THE COMPLAINTS ARE GOVERNED BY THE 3-YEAR STATUTE OF LIMITATIONS OF D.C. CODE § 12-301(8).

The three-year limitation period provided for in D. C. Code § 12-301(8) applies to the causes of action asserted in Counts II through V because no other limitation provision in the D. C. Code is analogous to these claims.

Counts II through IV of the Complaint allege, respectively, tortious actions in violation of the law of nations, tortious actions in violation of the treaties of the United States and tortious actions in violation of the laws of the United States.[30] The defendant NAAA argues that the allegations in these counts merely apply different labels to the common law tort claims alleged in Count I and, hence, are governed by the one-year period of limitations prescribed by § 12-301(4) for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution or false imprisonment." NAAA's Memorandum at 30. Leaving aside for the moment the fact that several of the intention-

---

(Continued from previous page)

under 28 U.S.C. 1331 as they arise under the statutes of the United States, and thus the laws of the United States. See *Cort v. Ash*, 422 U.S. 66 (1975); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1978); *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C. 1971).

30 Count V alleges a conspiracy to commit the aforementioned tortious actions.

al torts alleged in Count I are not among those specifically enumerated in § 12-301(4), the defendant's argument fundamentally misperceives the nature of the claims advanced in Counts II through V.

A tort, generally speaking, is an invasion of a legally protected interest that results in compensable damage. See *Federal Jurisdiction of International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala,* supra, note 140 at 88. As is explained in a prior section of this Memorandum, the tort claims alleged in Counts II through V are qualitatively different from the common law intentional torts alleged in Court I. These tort claims are different from the common law tort claims asserted in Count I because the legally protected interests at stake and the nature and purpose of the tortious conduct at issue are different.

In Count II, plaintiffs are seeking damages for injuries and death proximately resulting from the intentional invasion of interests protected by the law of nations. The law of nations does not protect a person from simple assault, battery or false imprisonment. Where, as in the instant case, internationally recognized human rights have been brutally violated by acts of terrorism aimed not just at the individual but also at the government of a state and the international community, the law of nations affords a distinct right of recovery. See *Filartiga v. Pena-Irala,* supra, 630 F.2d at 888-889.

The treaties and statutes of the United States relied upon by plaintiffs in Counts III and IV protect those rights expressly or impliedly created by the language of the treaties or statutes which are distinct from and differ-

ent in nature and kind from the simple torts of assault, battery and false imprisonment.

An argument similar to that advanced by defendant herein, raised in support of a motion to dismiss for lack of subject matter jurisdiction, was rejected by the D. C. Circuit in *Payne v. Government of District of Columbia,* supra. In *Payne,* plaintiffs' asserted claims based upon violation of their Fifth Amendment rights arising out of the action of a District of Columbia police officer in allegedly wilfully and maliciously aiming and several times discharging a firearm at plaintiffs while they occupied an automobile. In the course of rejecting the District of Columbia's argument that the case was a simple tort case, the outcome of which depended exclusively on common law principles, the Court noted:

> It would appear that *the interests protected by Federal Constitutional law and local assault law are not congruent* and that *injuries inflicted by officers acting under color of state law are significantly different in kind from those resulting from acts of private persons. Payne v. Government of the District of Columbia,* supra, note 32, 182 U.S. App. D.C. at 196, 559 F.2d at 817 (per Robinson C.J. with Tamm C.J., concurring in the result.) [Emphasis added]

Similarly, in the instant case, the legal injuries for which redress is sought and the legal interests that the federal causes of action asserted in Counts II, III, IV and V seek to vindicate differ significantly in kind from those addressed by the common law torts of assault, battery and false imprisonment.

Where a person seeks vindication of a federal right (and this includes rights under the law of nations incorporated in the federal law) for which Congress has not pre-

scribed a limitations period, the Federal Court will adopt the period of the most analogous statute of the state in which it sits, unless adoption of this period would conflict with the federal policy underlying the cause of action or would amount to a discriminatory restriction of a federal right of action. *Laffey v. Northwest Airlines, Inc.*, 185 U.S. App. D.C. 322, 567 F.2d 429 (1976), *cert. denied*, 434 U.S. 1086.

Since the legal interests protected by the federal rights that form the basis for plaintiffs' claims in Counts II through V are "significantly different in kind" from those protected by the common law causes of action for assault, battery and false imprisonment, D. C. Code § 12-301(8) is the most analogous state statute for plaintiff's federal claims. No D. C. Code limitation provision for specifically enumerated causes of action can be considered analogous. D. C. Code § 12-301(8) provides in such a circumstance that the applicable period of limitations is three years. This provision has been held to be sufficiently broad to include enforcement of federally-created rights for which Congress did not provide a specific limitations priod. *Cassel v. Taylor*, 100 U.S. App. D.C. 153, 243 F.2d 259 (1957); see also, *Laffey v. Northwest Airlines, Inc.*, 481 F. Supp. 199 (D.D.C. 1974). Since plaintiffs' federal causes of action were brought within the three-year limitations period prescribed by D. C. Code § 12-301(8), they are not barred by the statute of limitations.

Moreover, the one-year statute of limitations contained in the D. C. Code § 12-301(4) must not be applied to bar any of the federal claims of any of the plaintiffs

because to do so would create a conflict with the federal policies underlying those causes of action.

One of the recognized exceptions to the application of the most analogous state statute of limitations to a federal claim for which no federal limitation has been enacted is when to do so "would create important conflicts with the federal policy underlying the cause of action". *Laffey v. Northwest Airlines, Inc.*, supra, 185 U.S. App. at 359, 567 F.2d at 468. To the extent that § 12-301(4) was the most analogous state statute of limitations to the federal claims assered in Counts II through V, application of that provision to bar the claims of any of the plaintiffs would create just such a conflict with the federal policies underlying these causes of action and must be avoided.

In ratifying the treaties and enacting the statutes relied upon herein, including 28 U.S.C. 1350, it is reasonable to infer that Congress did not intend that the exercise of the federal rights thereby created was to be burdened by an unreasonably short state statute of limitations. This Court should borrow the particular limitations period prescribed by the District of Columbia "that best effectuates the federal policy involved." *Forresta' Village, Inc. v. Graham,* 179 U.S. App. D.C. 225, 227, 551 F.2d 411, 413 (1977). The federal policy underlying the creation of the federal rights relied upon by the plaintiff can best be effectuated by the borrowing of the three-year limitations period of D. C. Code § 12-301(8), which would enable the federal claims of all plaintiffs to be vindicated.

B. PLAINTIFFS' CAUSES OF ACTION IN COUNT I OF THE COMPLAINTS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND INTENTIONAL INFLICTION

OF CRUEL, INHUMAN AND DEGRADING TREATMENT ARE NOT BARRED BY THE ONE-YEAR LIMITATION PERIOD PROVIDED FOR IN D. C. CODE § 12-301(4) BECAUSE THEY ARE NOT AMONG THE TORTS SPECIFICALLY ENUMERATED THEREIN.

Section 12-301 of the D. C. Code provides a one-year statute of limitations for claims for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution and fase imprisonment." D. C. Code § 12-301(4). Two of the claims set forth in Count I of the complaint, specifically the claims for intentional infliction of emotional distress and intentional infliction of cruel, inhuman and degrading treatment, are not among those enumerated in § 12-301(4). The defendant NAAA contends that these two tort claims are "nothing more than supplemental descriptions of conduct which is fully encompassed by the traditional common law intentional torts of assault, battery and false imprisonment." NAAA's Memorandumm at 30. This characterization of these twc Count I claims is wholly inaccurate.

The intentional infliction of emotional distress is recognized as an actionable tort, distinct and independent from the intentional torts of assault and battery. See Prosser, *Law of Torts*, (4th Ed. 1971) § 12 at 56-59; Second Restatement of Torts, § 46, Comment K. The surviving plaintiffs and the decendents in these cases have suffered severe and permanent emotional trauma as a result of *inter alia* observing the killing and maiming of their loved ones and others during the course of this terrorist attack. The emotional distress engendered by experiencing these events is a compensable harm, wholly

distinct from any personal injury or apprehension of personal injury which they themselves suffered. As a result, this cause of action is not governed by the one-year statute of limitations in D. C. Code § 12-301(4).

Similarly, the intentional infliction of cruel, inhuman and degrading treatment is a tort distinct from those specifically enumerated in D. C. Code § 12-301(4). This tort, while encompassing some of the same elements as battery and false imprisonmment, is distinguished by the necessity of showing an intent to inflict treatment upon a person of such extreme barbarity as to be qualitatively different from mere unconsented to touching or unconsented to curtailment of freedom of movement. As a result, this cause of action is also not governed by the one-year statute of limitations in D. C. Code § 12-301(4).

NAAA further argues that, even if these two claims in Count I do state distinct causes of action, the intent of Congress must have been to include all intentional tort claims of the type asserted in Count I within D. C. Code § 12-301(4). Defendant cites no authority for this proposition.

Even a cursory reading of the language of § 12-301 reveals the fallaciousness of this argument. After listing in subsections, seven specific actions or sets of actions for which specific limitations periods are prescribed, it states: ". . . (8) for which a limitation is not otherwise *specifically prescribed*—three years." D. C. Code § 12-301(8). [Emphasis added] The inclusion of this general provision evidences a clear legislative intent that the seven preceding sections and the other limitations provisions scattered throughout the D. C. Code were meant to apply only to the

specific actions enumerated therein and to no others. See also *Gibson v. Gibson,* 240 Ark. 827, 402 S.W.2d 647 (1966) (a statute of limitations applies only to those actions that are specifically enumerated therein). All causes of action not enumerated in one of these sections were to be governed by the three-year general statute of limitations contained in § 12-301(8).

Moreover, where there is substantial doubt as to which of two periods of limitation is applicable, the longer periods should be held to apply. *Sonne v. Sachs,* 314 A.2d 194 (Del. 1978); *Mathews v. Travelers Indemnity Ins. Co.,* 245 Ark. 247, 432 S.W.2d 485 (1968); 51 Am.Jur.2d, Limitation of Actions § 63 (1970).

Plaintiffs' Count I claims for intentional infliction of emotional distress and intentional infliction of cruel, inhuman and degrading treatment are not barred by the statute of limitations because they were brought within the applicable three-year statute of limitations contained in D. C. Code § 12-301(8).

C. TO THE EXTENT THAT THE ONE-YEAR LIMITATIONS PERIOD OF D. C. CODE § 12-301(4) IS APPLICABLE TO ANY OF THE CLAIMS OF PLAINTIFFS AS ASSERTED IN THE COMPLAINTS, THE RUNNING OF THE STATUTE OF LIMITATIONS WAS TOLLED BY NAAA'S INTENTIONAL CONCEALMENT OF ITS INVOLVEMENT IN THE ACTIONS GIVING RISE TO PLAINTIFFS' CLAIMS.

It is established beyond dispute that:

Read into every statute of limitations, including the adoption of an analogous local statute of limitations, is the equitable doctrine that in case of defendant's

> fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit. *Fitzgerald v. Seamans,* 188 U.S. App. D.C. 175, 183, 553 F.2d 220, 228 (1977); see also *Hulmberg v. Armbrecht,* 327 U.S. 392, 396-97 (1946).

In the instant case, NAAA has engaged in a consistent course of conduct of intentionally concealing their connection to the acts giving rise to plaintiffs' claims. Indeed, this pattern of concealment continues to this very day. See Affidavit of Joseph B. Baroody filed in support of NAAA's Motion to Dismiss. Plaintiffs did not discover, and with the exercise of due diligence, could not have discovered, facts linking the NAAA to this terrorist act until shortly before the filing of the complaints. Under such circumstances, the running of the statute of limitations must be considered to have been tolled by NAAA's intentional concealment of facts evidencing its liability for plaintiffs' injuries.

D. IRRESPECTIVE OF WHICH STATUTE OF LIMITATIONS IS FOUND TO BE APPLICABLE, NONE OF THE CLAIMS OF THE MINOR PLAINTIFFS CAN BE BARRED BY THE STATUTE OF LIMITATIONS.

Many of the persons killed or maimed in this terrorist attack were children under the age of 18. The D. C. Code provides that, when any person has a cause of action which accrues prior to his reaching 18 years of age, the statute of limitations is tolled until he reaches that age. D. C. Code § 12-302(a)(1). Hence, none of the claims of any of the plaintiffs in these actions who were under age 18 at the time the terrorist attack occurred, and did not

reach age 18 before one year prior to the filing of the complaints, can be barred by the statute of limitations, irrespective of which statute of limitations is found to be applicable.

IX. CONCLUSION

WHEREFORE, for all of the foregoing reasons, plaintiffs respectfully request that this Court deny the motion of National Association of Arab Americans to dismiss for lack of subject matter jurisdiction and for expiration of the limitations period.

Respectfully submitted,

HANOCH TEL-OREN, et al.

By: Michael S. Marcus

Oren R. Lewis, Esquire
Richard H. Jones, Esquire
Michael S. Marcus, Esquire
William E. Donnelly, Esquire
LEWIS, WILSON, LEWIS & JONES, LTD.
Post Office Box 827
Arlington, Virginia 22216

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Uo. 81-0563

HANOCH TEL-OREN, on behalf of the deceased, Imry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

REPLY MEMORANDUM OF DEFENDANT NATIONAL ASSOCIATION OF ARAB AMERICANS IN SUPPORT OF ITS MOTION TO DISMISS

RECEIVED
MAY 21, 1981
JAMES F. DAVEY, Clerk

HILL, CHRISTOPHER AND PHILLIPS, P.C.
1900 M Street, N.W.
Washington, D.D. 20036
(202) 452-7000

Counsel for Defendant
National Association of Arab Americans, Inc.

Of Counsel:

CHERIF SEDKY
LAWRENCE COE LANPHER
KARLA J. LETSCHE

Dated: May 21, 1981
Washington, D. C.

TABLE OF CONTENTS

	Page
Introduction	1
Argument	
Point One: Plaintiffs Seek to Hold the NAAA Liable for Its Political Views	2
Point Two: Plaintiffs Grossly Mischaracterize the Political Views Which They Attribute to the NAAA	8
Point Three: Plaintiffs Fail to Rebut the Legal Arguments Made by the NAA	12
A. The Statute of Limitations Issue	13
B. The Jurisdictional Issues	15
Point Four: Plaintiffs Have Not Alleged — And Cannot Allege — A Legal Conspiracy Claim Against NAAA	19
Point Five: The Chilling Effect of the Pendency of These Cases Requires Plaintiffs to Come Forward with Evidence of NAAA Participation in the Allegedly Tortious Conduct or Suffer Dismissal of their Claims	20
Conclusion	22

TABLE OF CASES

	Page
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	21-22
Bell v. Hood, 327 U.S. 678 (1946)	17
Black & Yates v. Mahogany Association, 129 F.2d 227 (3rd Cir. 1941), *cert. denied*, 317 U.S. 672	19
Bloomgarden v. Coyer, 479 F.2d 201 (D.C. Cir. 1973)	21
Brandenburg v. Ohio, 395 U.S. 444 (1969)	6
Connor v. Real Title Corporation, 165 F.2d 291 (4th Cir. 1947)	19
Dayco Corporation v. Goodyear Tire & Rubber Company, 523 F.2d 389 (6th Cir. 1975)	15
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	18
First National Bank v. Cities Service Company, 391 U.S. 253 (1968)	20-21
First National Bank v. Williams, 252 U.S. 504 (1920)	16
Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)	22
Granville v. Hunt, 411 F.2d 9 (5th Cir. 1969)	20
Healy v. James, 408 U.S. 169 (1972)	7
Heart Disease Research Foundations v. General Motors Corporation, 463 F.2d 98 (2d Cir. 1972)	19
Jacobs v. Tenney, 316 F. Supp. 151 (D.Del. 1970)	19
National Life Insurance Company v. Silverman, 454 F.2d 899 (D.C. Cir. 1971)	21
Noto v. United States, 367 U.S. 290 (1961)	6
Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977)	19

TABLE OF CASES—Continued

	Page
Payne v. Government of District of Columbia, 559 F.2d 809 (D.C. Cir. 1977)	17
Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964)	19
Richardson v. Rivers, 335 F.2d 996 (D.C. Cir. 1964)	21
Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980)	7
Yates v. United States, 354 U.S. 298 (1957)	6

STATUTES

Title 18, U.S.C.	15
28 U.S.C. § 1330	15
28 U.S.C. § 1331	15-17
28 U.S.C. § 1332	15
28 U.S.C. § 1350	15, 17, 18
28 U.S.C. § 1602-11	15
D.C. Code § 12-301(4)	13, 14, 15

INTERNATIONAL MATERIALS

Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, U.N. General Assembly Resolution 2787, (December 6, 1971) (Exhibit 3)	8
Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. General Assembly Resolution 2851, (December 20, 1971) (Exhibit 2)	8

Page

United Nations Relief and Works Agency for Palestine Refugees in the Near East, U.N. General Assembly Resolution 2792, (December 6, 1971) (Exhibit 1) 8

MISCELLANEOUS AUTHORITIES

Maksoud, Introduction, in *Palestine Lives*: *Interviews with Leaders of the Resistance* (Palestine Research Center and Kuwaiti Teachers Association, 1973) 10

2A Moore's Federal Practice ¶ 8.17[5] 19

Rule 9(b), Fed. R. Civ. P 15

Rule 56 (e), Fed. R. Civ. P. 21

PERIODICALS

Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala,* 22 Harv. Int'l. L.J. 53 (1981) 16, 18

Gilden, Forceful Voice for Arab Americans, The Washington Post, August 2, 1978, D1. (Exhibit 4) 9-10

Sharabi, *Liberation or Settlement: The Dialectics of Palestine Struggle, Journal of Palestine Studies,* 33 (Winter 1973) (Exhibit 6) 10-12

Vickers, Not Just Guerrillas, The Wall Street Journal, October 22, 1979, 1. (Exhibit 7) 12

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0563

HANOCH TEL-OREN, on behalf of the deceased, Imry Tel-Oren, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

Civil Action No. 81-0564

HANOCH TEL-OREN, *et al.*,

Plaintiffs,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Defendants.

REPLY MEMORANDUM OF DEFENDANT NATIONAL ASSOCIATION OF ARAB AMERICANS IN SUPPORT OF ITS MOTION TO DISMISS

This memorandum is submitted on behalf of the National Association of Arab Americans, Inc. ("NAAA") in response to the Consolidated Memorandum of Points and Authorities Submitted by Plaintiffs in Opposition to the Motion of National Association of Arab Americans to Dismiss the Complaints for Lack of Subject Matter Jurisdiction and for Expiration of the Limitations Period (hereinafter, the "Memorandum in Opposition").

INTRODUCTION

In the ensuing discussion the NAAA intends to make the following points:

— *First,* the Memorandum in Opposition makes clear what the NAAA has suspected all along: plaintiffs seek to hold the NAAA liable for expressing and otherwise being associated with political views which are inimical to those of plaintiffs or of whomever is really behind this litigation. However, the political views which are attributed by plaintiffs to the NAAA are Constitutionally protected.

— *Second,* in any event, plaintiffs grossly mischaracterize the political views which they attribute to the NAAA.

— *Third,* plaintiffs fail to rebut the legal arguments made by the NAAA in its Memorandum in Chief.

— *Fourth,* even viewing plaintiffs' claims in the most favorable possible light, the only legal theory upon which they could conceivably go to trial against the NAAA is one of conspiracy. Nevertheless, they have not alleged — and cannot in good conscience allege — a legally sufficient conspiracy claim against the NAAA.

— *Fifth,* given the posture of these cases, plaintiffs should not be permitted to go forward unless and until they satisfy this Court that there is at least a shred of evidence that the NAAA in any way participated in the acts of which plaintiffs complain.

ARGUMENT

Point One: Plaintiffs Seek to Hold the NAAA Liable for Its Political Views.

As noted both in its Answers to the Complaints herein and in its Memorandum of Points and Authorities

in support of its Motion to Dismiss (the "Memorandum in Chief"), the NAAA is of the firm conviction that the instant lawsuits, as against the NAAA, are totally without foundation in fact, were vexatiously brought, politically motivated, and intended merely to hamper the NAAA and its members in the conduct of their legitimate educational, civic and political activities within the United States. The Memorandum in Opposition demonstrates beyond any doubt that the NAAA's conviction is fully justified. The NAAA has challenged plaintiffs to furnish even a scintilla of evidence in support of the irresponsible, inflammatory and slanderous allegations they have made against this highly regarded organization.[1] In their Memorandum in Opposition plaintiffs have come up with zero — thus exposing the utter speciousness of their claims against the NAAA.

Indeed, rather than successfully rebutting the NAAA's arguments that this Court lacks jurisdiction over their claims against the NAAA, for which no factual basis has been alleged in any event, plaintiffs' Memorandum in Opposition has instead raised serious Constitutional issues. The Memorandum in Opposition makes clear that plaintiffs' theory of this case, as against the NAAA, involves Constitutionally protected free speech by American citizens and their First Amendment rights of free association.

Plaintiffs' Memorandum in Opposition crystallizes what their Complaints implied — that the NAAA itself

---

[1] See Memorandum in Chief at 27, 3-4, and letters from Presidents Ford and Carter, attached as Appendices to Affidavit of Joseph D. Baroody (hereinafter "Baroody Affidavit"), which was Exhibit 1 to the Memorandum in Chief.

had no participation whatsoever in the March 11, 1978 bus incident. Regardless of the relative merit of plaintiffs' assertions of others' involvement in the incident, plaintiffs now concede that the bus incident does not in any way implicate the NAAA. Thus, according to plaintiffs, "The March 11 attack . . . was part of an overall plan designed by the *PLO and Libya* . . . ."[2] Also according to plaintiffs, "the *PLO and Libya* contemplated committing the act of genocide against the population of Israel," and the "March 11 attack was part of this act of genocide."[3] Indeed, the Memorandum in Opposition is replete with attribution of responsibility, for every specific aspect of the training and planning for, and the implementation of the bus attack, to the El Fatah, the PLO, and Libya[4] — not to the NAAA.

Similarly, plaintiffs concede that the NAAA played no role in the purchase of weapons used in the bus incident. The Memorandum in Opposition alleges only that "much of the arms and equipment used . . . in the March 11 attack were obtained by the *PLO through Libya*," allegedly through the hiring of American citizens — none of whom are claimed to have had any affiliation with the NAAA — to procure weapons in the United States.[5]

Plaintiffs are also unable to allege that the NAAA raised funds for the March 11 incident. Plaintiffs' only

---

2 Memorandum in Opposition, 4.

3 Memorandum in Opposition, 4.

4 See, for example, Memorandum in Opposition at 1-2, 4 and 6.

5 *Id.* at 6.

specific allegation of fund-raising in their Memorandum in Opposition is not in any way connected with the bus incident; relates to activities in 1976 and 1977; and, plaintiffs concede, involves groups not even alleged to have been affiliated with the NAAA.[6] Thus, with respect to the NAAA, plaintiffs are able to make nothing but bald, conclusory and — in light of their specific allegations against others — meaningless, allegations of "conspiracy," "assistance" and "legal responsibility."

Being unable to marshal a single shred of evidence linking the NAAA to the bus incident itself, plaintiffs are forced to resort to the McCarthyist accusatory technique of "guilt by association." Plaintiffs seek to impose liability on the NAAA, not for what the NAAA did, but because its *objectives* are alleged to be "virtually identical to the aims and objectives of the PLO."[7] Instead of pointing to even one act of the NAAA evidencing its alleged participation in the incident — of which there are none, as plaintiffs well know — plaintiffs do nothing but pounce upon selected portions of certain statements made by a member and former President of the NAAA in the exercise of his individual First Amendment right of free speech.[8] Plaintiffs quote Professor Hisham Sharabi,

---

6 *Id.* at 6-7 and 8-9.

7 Memorandum in Opposition, 8.

8 The NAAA was, frankly, puzzled by plaintiffs' statements concerning supposed "contradictions" in Mr. Baroody's March 21, 1978 letter to NAAA members (Appendix H to Memorandum in Opposition), and the March 15, 1978 NAAA press release (Appendix G to Baroody Affidavit, Exhibit 1 to Memorandum in Chief), as well as by plaintiffs'

(Continued on next page)

a noted Palestinian intellectual who is Senior Professor of History at Georgetown University, as follows:

— in an interview conducted several *months after the bus incident,* Professor Sharabi is quoted as as having said "I don't condemn the use violence, as such, when it is carried out in a just cause, such as that of the Palestinians."[9] Professor Sharabi was also quoted as having said that the March 11 incident showed that Palestinians are willing "to hurl their bodies against the monster."[10]

— Professor Sharabi is purported to have stated in an introduction to a book, *published in 1973,* describing the Palestinian resistance movement subsequent to the Israeli occupation of Palestine, that "the organized violence of the oppressed Palestinians" and their "armed struggle" had enabled the Palestinian resistance movement for self-determination to "organiz[e] the people for carrying out political struggle."[11] Professor

---

(Continued from previous page)

apparent attempt to relate the letter to some kind of NAAA involvement in the March 11 bus attack. A review of the two documents makes abundantly clear what they are. The press release, issued four days after the bus attack, condemns terrorism as manifested in both the March 11 incident and the Israeli invasion of Lebanon on March 14. The March 21 letter to NAAA members discusses what had by that time become the Israeli occupation of Southern Lebanon; decries the death of almost 1,000 Lebanese and Palestinian civilians caused by Israeli air bombardment of Lebanese villages and refugee camps; and urges the members to petition their Senators and Congressmen to take steps to achieve Israeli withdrawal and to provide humanitarian relief to those left hurt and/or homeless. If there are any contradictions in these documents, they totally escape the NAAA.

9 Memorandum in Opposition, 3.

10 *Id.*

11 *Id.* at 7.

Sharabi is alleged to have made similar statements in another 1972 publication which plaintiffs fail to identify in any meaningful way.[12]

— Finally, plaintiffs baldly assert that Professor Sharabi "was and remains a close personal friend of Yasar [sic] Arafat, leader of the PLO, and was and remains in close consultation with Arafat. Sharabi has actually been named as a possible member of a PLO government in exile."[13]

Even a first year law student would recognize that no American court would counterance the imposition of evil liability solely on the expression of an opinion on a political issue. The adoption of such a legal theory would obviously have a significant and Constitutionally impermissible chilling effect on the exercise of First Amendment rights. Even if the NAAA had made the statements attributed to Professor Sharabi by plaintiffs, and even if such statements had involved the bus incident at issue (which they did not), such statements constitute clearly protected speech. It is an axiomatic principle of Constitutional law that such statements cannot serve as a basis for finding the NAAA liable for the tortious conduct of others. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law viola-

---

12 *Id.* at 7-8.

13 *Id.* at 4. Plaintiffs' theory of the NAAA's liability based *solely* on the foregoing statements is so patently defective that we feel no need even to raise the question of the NAAA's adoption of Professor Sharabi's individual statements—many of which were made even before the NAAA was organized in 1973.

tion except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Noto v. United States,* 367 U.S. 290 (1961); *Yates v. United States,* 354 U.S. 298, 321 (1957) ("advocacy [of the doctrinal justification of forcible overthrow, with the intent to accomplish such overthrow], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action . . . ."). As discussed further below, the statements attributed to Professor Sharabi were made in a newspaper interview and in a scholarly journal. As such, they do not even remotely approach the kind of incitement for which the NAAA might conceivably be held liable.

Plaintiffs' suggestion that tort liability can be based solely upon the political views of persons with whom one associates is equally repugnant to basic First Amendment principles. *See Healy v. James,* 408 U.S. 169, 185-86 (1972) ("it has been established tha 'guilt by association alone . . .' is an impermissible basis upon which to deny First Amendment rights," and "the Court has consistently disapproved . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."); *Sawyer v. Sandstrom,* 615 F.2d 311, 317 (5th Cir. 1980) ("knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct"). In consequence, this Court should reject plaintiffs' blatant attempt to bootstrap their baseless charges against the NAAA. Even if the NAAA did "share the general objectives of the PLO," that clearly affords no basis for NAAA responsibility for particular tortious acts.

Under plaintiffs' theory, American Irish Catholics who support the overall objective of the Irish Republic Army (the "IRA") — that is, the establishment of a separate Catholic state in Northern Ireland — would be liable for all senseless acts of violence committed by IRA members. The argument would go as follows: (1) the IRA is known to commit senseless acts of terror; (2) any active support of the IRA or its objectives, or recognition that the Irish resistance movement is an armed or violent struggle, must be equated to the encouragement and support of IRA terrorist activities; (3) such encouragement of terrorist activities constitutes a conspiracy to commit, or the "assistance" in the commission of, any specific terrorist act of the IRA (even if the American IRA supporter had nothing to do with that act). Thus, according to plaintiffs, if you support the IRA or its objectives — or, for that matter, any political movement that has any connection with violent activities, whether conducted by the entire group, a fraction of the group, or even a fanatic who claims association with the group — you had better not publicly express your support or you will face the prospect of billions of dollars in civil liability! Such a theory not only flies in the face of basic American Constitutional principles of free speech and association, but it could be applied to create civil liability for supporters of any movement that regularly, or even occasionally, is forced to resort to armed or violent struggle.[14]

---

[14] Indeed, under plaintiffs' theory of this case, American supporters of Israel would find themselves facing enormous civil liabilities. Thus, Palestinian and other victims of Is-

(Continued on next page)

In short, the fact that certain NAAA members, and the NAAA itself, may have spoken out in favor of Palestinians self-determination, is irrelevant to the liability issues of this case.[15] And even if NAAA members have spoken out in support of armed or violent resistance by the Palestinian people, such expressions cannot support plaintiffs' allegations of liability against the NAAA for a particular act of terrorism.

(Continued from previous page)

rael's acts of violence—including the demolition of homes and businesses, the confiscation of property, the shooting of high school students who support Palestinian self-determination, the torture of political prisoners, the expulsion of political figures, the sanctioning of vigilante terrorist groups, and the bombardment of medical facilities and refugee camps in Southern Lebanon—could seek to hold American supporters of Israel civilly accountable for Israel's conduct merely on a showing that the supporters knew that Israel systematically engaged in such conduct. Indeed, the United Nations General Assembly, by vote of over two-thirds of the member nations, has recognized and deplored the fact that rights of Palestinians have been violated by Israel, as evidenced by General Assembly Resolutions 2792 C, D, and E of December 6, 1971, and 2851 of December 20, 1971, copies of which are attached hereto as Exhibits 1 and 2.

15 Moreover, the NAAA is not alone in taking this position. For example, the General Assembly of the United Nations, again by more than a two-thirds majority, has recognized and affirmed not only "the inalienable rights of all peoples, and in particular . . . the Palestinian people, to freedom, equality and self-determination," but it has also recognized "the legitimacy of their struggles to restore those rights," and has affirmed "man's basic human right *to fight for the self-determination of his people . . . .*" General Assembly Resolution 2787 of December 6, 1971, a copy of which is attached hereto as Exhibit 3 (emphasis added).

Point Two: Plaintiffs Grossly Mischaracterize the Political Views Which They Attribute to the NAAA.

In its Memorandum in Chief, the NAAA conscientiously refrained from addressing the politically and emotionally sensitive issues that underlie the pending lawsuits. Instead, it made a good faith effort to discuss only the legal issues this Court sought to have analyzed. However, because plaintiffs not only raised the political issues, but in doing so presented distorted, blatantly false, and inflammatory versions of those issues, the NAAA feels compelled to set the record straight.

In their Memorandum in Opposition plaintiffs carefully refrain from presenting Professor Sharabi's statements in context, provide no citation whatsoever for several of their conclusory and inflammatory accusations, and otherwise attempt to distort the true positions of Professor Sharabi and of the NAAA on the highly charged political issue of Palestinian self-determination.

Thus, plaintiffs totally mischaracterize the interview in which Professor Sharabi said that he did not condemn the use of violence when it is carried out in a just cause, and that the March 11 bus incident showed that Palestinians are willing "to hurl their bodies against the monster." In quoting out of context, plaintiffs would like this Court to believe that Professor Sharabi actually advocated the kind of violence exemplified by the bus incident. A reading of the reported interview in its entirety, however, reveals that nothing could be further from the truth. The interview as a whole, a copy of which is attached hereto as Exhibit 4, makes clear that Professor Sharabi favors a negotiated settlement of the Palestine question. Concerning such a settlement, he said:

> "A settlement [must be] based on full rights of Palestinians, particularly self-determination and complete withdrawal of Israel from occupied areas and total sovereignty for Palestinians. Anything short of that is inadequate. It must include the Gaza Strip and West Bank and East Jerusalem . . . .[16]

Moreover, with respect to the bus incident itself, Professor Sharabi expressed his dismay at the incident, calling it "politically unfortunate, humanly unfortunate," while likening it to tactics utilized by Israeli Prime Minister Begin when he headed the "terrorist group" known as the Irgun when Israel was first created in 1948.[17]

Even more flagrant is plaintiffs' reference to a nonexistent Sharabi introduction to a publication entitled *Palestine Lives: Interviews With Leaders of the Resistance.*[18] As the Court can see for itself, the introduction was written by the Honorable Clovis Maksoud, a noted Christian Lebanese intellectual who is currently Representative of the League of Arab States to the United Nations. The introduction contains not one word of those identified by plaintiffs as having been quoted from that source. Instead, it contains a thoughtful analysis of the development of the Palestinian resistance movement after the June 1967 Arab-Israeli war.

Plaintiffs again misrepresent and distort Professor Sharabi's views by quoting from an article which appeared in the Arabic publication *Shu'on Falastiniyeh* (Palestin-

---

16 Exhibit 4 at D3.

17 *Id.*

18 See Memorandum in Opposition, 7. A copy of the actual introduction to that book is attached hereto as Exhibit 5.

ian Affairs).[19] In their Memorandum in Opposition, plaintiffs highlight Professor Sharabi's use of the words "organized Palestinian violence" in an effort, no doubt, to equate in the mind of the reader the terms "Palestinian violence" with "terrorism," "genocide," "holocaust" and other emotionally charged code words used by plaintiffs. The full article, entitled "Liberation or Settlement: The Dialectics of Palestinian Struggle," which appeared in English in the scholarly *Journal of Palestine Studies* (Winter 1973), is attached hereto as Exhibit 6.

Professor Sharabi's article makes clear that Palestinian resistance, and indeed violent struggle, is directed at a governmental structure—Zionism—with which the Palestinians (and other Arab countries) are still at war—and have been since 1948. Far from seeking the genocide of the Israeli people as suggested by plaintiffs, the Palestinian armed struggle of which Professor Sharabi wrote in 1972, sought to establish a secular democratic state within which Jews and Palestinians (Christian and Muslim) could live in harmony:

> The [Palestinian] organizations all share the conviction that liberation must in the end be *based on Palestinian-Jewish accord* outside the framework of Zionism. But the task of breaking the Zionist superstructure cannot be carried out by the Palestinians alone, in their capacity as an outside source. To succeed, this project must also become a Jewish undertaking . . . .[20]

Indeed, the notion of Jewish-Palestinian accord is a theme which runs consistently throughout Professor Shar-

---

19 See Memorandum in Opposition, 7-8.

20 Exhibit 6 at 41 (emphasis added).

abi's article. He points out that Palestinians must "show convincingly (not only in ideological terms) that they are headed towards a socialist society, in which Jews have equal rights . . . ." And, further:

> The Palestinians' . . . fight is for their full human rights—including the fundamental right to live in democratic freedom in their own homeland (in this case, in a joint democratic state in which Jews now in Israel would enjoy equal rights with the Arabs).[21]

Given the foregoing context, even the passage from which plaintiffs quote Professor Sharabi in their Memorandum in Opposition makes clear the distinction between advocating the destruction of Zionism as a *political structure* and advocating violence against Israelis *per se*. The passage, set forth in full, reads as follows:

> [T]o the extent that Zionism constitutes a negation of the Palestinians, liberation must constitute a negation of Zionism. Within existing reality, political settlement can only mean a settlement based on the "unrealty" of the Palestinians, on their being reduced to permanent uprootedness—to refugees, to a stateless conglomeration of individuals, to a non-people. The opposition therefore presents itself in absolute terms: settlement cannot be achieved except by the dissolution of the Palestinian people—or by the dissolution of Zionism. Here the equation is between the dissolution of a *people* [the Palestinians] and the dissolution of a *structure,* specifically the overthrow of Israel's Zionist leadership and policy, the dismantling of its colonial apparatus, the abrogation of its theocratic and racist framework, etc., and its replacement by a humane, free, democratic structure.[22]

---

21 Exhibit 6 at 42-43 (parentheses in original).

22 Exhibit 6 at 46 (emphasis in original).

Finally, plaintiffs' attempt to portray Yassir Arafat, the PLO, El Fatah, (and, by association, the NAAA), as having objectives that are limited to plotting and perpetrating "terrorist acts," "genocide" and "holocausts," is not merely a distortion, it is a denial of fact. It is well known, as reported by *The Wall Street Journal*, that the PLO is, in effect, 'a government-in-exile for the world's 3.5 million to four million Palestinians."[23] The PLO has "its own 'state department,' welfare agency, hospital chain [in 1979, consisting of 12 hospitals and 100 clinics], 'national' library, education department, think tank, press agency, radio network and tax-collection system."[24] The PLO in 1979 ran 33 factories, paid Palestinians pensions and other benefits estimated at $30 million a year, collected taxes ranging from 3% to 6% of gross salary from Palestinians all over the world, maintained diplomatic offices in more than 50 countries, and provided academic scholarships for thousands of students.[25] As the *Wall Street Journal* recognizes, the PLO, and its many divisions and factions, have numerous legitimate and admirable goals and purposes. Thus, "support" of the PLO or its "goals" cannot, under any circumstances, be blithely assumed to imply support for particular terrorist acts that may be carried out in the name of one faction or another of the PLO.

---

23 R. Vicker, Not Just Guerillas, Wall St. J., October 22, 1979, 1. A copy of Mr. Vicker's article is attached hereto as Exhibit 7.

24 *Id.* See Exhibit 7.

25 *Id.* See Exhibit 7.

Point Three: Plaintiffs Fail to Rebut the Legal Arguments Made by the NAAA.

Not only have plaintiffs raised serious constitutional issues in their Memorandum in Opposition, but they also fail to overcome the substantial statute of limitations and jurisdictional hurdles identified by the NAAA in its Memorandum in Chief.

A. *The Statute of Limitation Issue.*

With respect to the statute of limitations issue, plaintiffs counter the NAAA's argument that the one-year limitations period of D.C. Code § 12-301(4) bars their action by stating, over and over, that their claims are not merely traditional assault, battery, and related intentional tort claims. Rather, they explain, their Count II through V claims "are different . . . because the legally protected interest at stake and the nature and purpose of the tortious conduct at issue are different."[26] Thus, plaintiffs contend that their claims arise under the "law of nations," based on their assertion that the acts allegedly perpetrated against plaintiffs on March 11 were "aimed not just at the individual but also at the government of a state and the international community."[27] Plaintiffs' arguments ignore two basic legal propositions which, when applied here, lead to the inescapable conclusion that plaintiffs' claims are time-barred.

First, as explained in the NAAA's Memorandum in Chief, in deciding which statute of limitations to apply a court must look to the substance of a plaintiff's claim rath-

---

[26] Memorandum in Opposition, 29.

[27] Memorandum in Opposition, 29, 12.

er than to his descriptive language or the label he applies to his claim. (*See* Memorandum in Chief, 30-31). Here, plaintiffs allege that they were assaulted, threatened, imprisoned, battered, wounded, and suffered physical and mental injury during the bus attack. Plaintiffs' own *ipse dixit* statements aside, it is clear that the *substance* of plaintiffs' claims are encompassed by Section 12-301(4) which covers intentional torts.

Plaintiffs' frequent use of emotional code words such as "torture," "genocide," and "terrorism" in describing the tortious acts complained of, as well as their ceaseless incantation of the "law of nations," should not distract this Court from the required analysis of the *substance* of plaintiffs' claims. This is not meant to imply that plaintiffs' injury or suffering was necessarily any less than that alleged in the Complaints; merely that fear is fear, pain is pain, and injury is injury, regardless of where, by whom, or for what reasons it may have been inflicted. In enacting Section 12-301(4), Congress plainly intended to prohibit persons from sitting on known causes of action — those arising from intentional torts — by requiring such actions to be brought within a year. Plaintiffs' claims are therefore time-barred.

Second, plaintiffs' assertion that the alleged tortious conduct was aimed against the government of Israel and against "the international community" has no bearing whatsoever on the statute of limitations question. Plaintiffs do not assert claims for injury suffered by Israel or by the so-called international community. Of course, they would have no standing to do so in any event. However, even if the perpetrators of the bus incident did intend the attack as an act against Israel or the inter-

national community — a fact which is totally speculative at this time — the nature of *plaintiffs'* causes of action remains unchanged. Plaintiffs are still the alleged victims of particular intentional conduct that caused them injury. They are victims of intentional torts and their claims are barred by the one year statute of limitations.

Finally, plaintiffs' argument that their claims for the "intentional infliction of mental distress" and the "intentional infliction of cruel, inhuman and degrading treatment" are not covered by Section 12-301(4), must also fail. As noted in the NAAA's Memorandum in Chief, these so-called torts are not properly pleaded in the Complaints as separate causes of action. *(See* Memorandum in Chief, 29-30). Moreover, in the Memorandum in Opposition, plaintiffs provide no authority for their apparent belief that such "torts" are recognized as independent causes of action under D.C. law. Clearly, plaintiffs can request damages for the mental suffering they may have experienced as a result of the conduct of those who perpetrated the bus attack. Such an entitlement to *damages,* however, even if recognized by the Court, does not mean that plaintiffs have pleaded any causes of action separate from those covered by Section 12-301(4) for intentional torts. Plaintiffs' claims, therefore, are time-barred.[28]

---

[28] Plaintiffs' one paragraph attempt to argue that the one-year statute was tolled as a result of "the NAAA's intentional concealment of its involvement in the actions giving rise to plaintiffs' claims," barely even merits a response. (Memorandum in Opposition, 33-34). If plaintiffs are serious about this allegation, it is clear that they must comply with Rule 9(b), Fed. R. Civ. P., and plead "with particularity" the circumstances of the alleged fraudulent concealment. *See Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389 (6th Cir. 1975).

B. *The Jurisdictional Issues.*

With respect to the jurisdictional issues, plaintiffs have apparently abandoned their claims of jurisdiction as to the NAAA under Sections 1330, 1332, and 1602-11, as well as their claims of Section 1331 jurisdiction based on violations of Title 18. They did not even bother to respond to the NAAA's contention that there is no jurisdiction under these sections. Plaintiffs' arguments concerning the only remaining jurisdictional issues — those based on Section 1331 for violation of federal common law and U.S. treaties, and on Section 1350 — fail to address the fundamental legal barriers to such jurisdiction which were raised in the NAAA's Memorandum in Chief.

Plaintiffs' Section 1331 argument has two parts. First, they argue that because the tortious conduct "of the PLO terrorists" is in violation of the law of nations, which is a part of the federal common law, this Court has Section 1331 jurisdiction over the NAAA. Second, they argue that because their causes of action arise under various U.S. treaties, this Court has a separate basis for jurisdiction under Section 1331.

Plaintiffs devote several pages of their Section 1331 discussion to a discourse on the law of nations, its relation to federal common law, the "hideous nature" of the tortious conduct complained of, and various treaties, resolutions and conventions. However, they never even mention the legal prerequisite to all Section 1331 jurisdiction — that the construction or application of federal law must be "a pivotal issue" in the case. There can be no Section 1331 jurisdiction unless a plaintiff's asserted claim "will be sustained by one construction of the [federal] law, or defeated by another . . . ." *First*

National Bank v. Williams, 252 U.S. 504, 512 (1920). Clearly, plaintiffs ignored this point because its application in their case results in a denial of subject matter jurisdiction under Section 1331. As noted in the NAAA's Memorandum in Chief, plaintiffs have not — and cannot — demonstrate the requisite "substantial nexus" between their claims and federal law (whether arising under the law of nations, common law, or U.S. treaties) to confer Section 1331 jurisdiction. *(See* Memorandum in Chief at 5-7). And, unless plaintiffs meet the threshold requirement of "substantial nexus," this Court need not even reach the complex questions of what constitutes the "law of nations" and just how it becomes part of the "federal common law." We submit that plaintiffs' civil damage claims herein can easily be adjudicated without the application or interpretation of any aspect of federal law, and therefore Section 1331 jurisdiction should be denied.[29]

In addition, plaintiffs also fail to provide any authority for their naked assertion that the treaties and other documents upon which they seek to base Section 1331 jurisdiction give rise to a private cause of action for damages. The law is clear that, in the absence of specific implementing legislation, a treaty, that is not self-executing, does not give rise to a private right of action. As was discussed at some length in the NAAA's Memorandum in Chief, none of the treaties or other materials cited by

---

[29] This is the case notwithstanding plaintiffs' frequent reference, in their Memorandum in Opposition, to the so-called "tort" of "genocide." "Genocide" was not pleaded in the Complaints; moreover, it clearly has no bearing whatsoever on this lawsuit.

plaintiffs give rise to judicially enforceable private rights of action. (See Memorandum in Chief at 12-19).[30] Accordingly, in addition to the fact, discussed above, that such treaties lack a substantial nexus to plaintiffs' claims, they cannot serve as the basis of jurisdiction under Section 1331 because they provide no right of action.

Payne v. Government of District of Columbia, 559 F.2d 809 (D.C. Cir. 1977), cited by plaintiffs to support their assertion of Section 1331 jurisdiction, is inapposite. In *Payne,* the plaintiffs asserted that their Fifth Amendment rights had been violated by the allegedly willful and malicious discharge of a firearm at them by a District of Columbia police officer acting under color of law. They sought damages under the theory of *Bell v. Hood,*[31] and alleged federal jurisdiction under Section 1331. In their Memorandum in Opposition, plaintiffs cite *Payne* as authority for their assertion that their law of nations and treaty-based claims are different in kind from their common law claims and that they give rise to federal jurisdiction.[32]

---

30 *Accord,* Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filargita v Pena Irala,* 22 Harv. Int'l. L. J., 53, 71 n. 82 (1981) (hereinafter "Blum & Steinhardt").

31 *Bell v. Hood,* 327 U.S. 678 (1946), recognized the existence of a private right of action for damages, against government officials acting under color of law, for invasion of Fourth and Fifth Amendment rights.

32 It should be noted at the outset that the court's action in *Payne* was a *per curiam* reversal of the district court's dismissal, and a remand for further proceedings. Each member of the panel wrote a separate opinion, concurring in

(Continued on next page)

The holding in *Payne* has no applicability to plaintiffs' claims herein because the situations presented are not even analagous. In *Payne*, the claim upon which federal jurisdiction was based arose out of a well-recognized private right of action under the Fifth Amendment. No such private right of action is recognized under any of the statutes or treaties upon which plaintiffs rely.[33]

Plaintiffs' argument concerning jurisdiction under Section 1350 is tortuously developed in their Memorandum in Opposition. It boils down to their urging this Court to find Section 1350 jurisdiction as to the NAAA because the tortious conduct complained of allegedly violates the law of nations. In making this argument, plaintiffs ignore the fact that they fail to meet the two threshhold requirements for Section 1350 jurisdiction.

Section 1350 only confers jurisdiction over an action that meets three criteria: it must be (1) brought by an alien; (2) for a tort; and (3) the tort must have been committed in violation of the law of nations or a treaty. Because plaintiffs include several United States citizens, the first requirement has not been met here. Further-

---

(Continued from previous page)

the remand result. The two opinions *not* cited by plaintiffs (those of Judge Tamm and Judge MacKinnon), expressed serious doubts as to whether the asserted federal claim was substantial enough to invoke federal question jurisdiction. Both judges indicated a concern about plaintiffs' asserting a "factually baseless federal claim" merely to get into federal court. *See* 559 F.2d at 823-24 (Tamm, J. concurring in result) and at 830 (MacKinnon, J. concurring specially).

[33] It should be noted that Section 1350 is a *jurisdictional statute* and creates no substantive federal claims upon which plaintiffs can rely.

more, even if all plaintiffs were aliens, the second requirement has not—and cannot—be met as against the NAAA. Despite the fact that plaintiffs discuss at length the tortious conduct allegedly committed against them by the PLO and by Libya, plaintiffs do not make any allegations of specific conduct *by the NAAA* that can be said even to remotely resemble a tort.[34] Thus with respect to Section 1350 jurisdiction, it is not even necessary to reach the law of nations issue dwelt upon *ad nauseum* by plaintiffs because the necessary predicate to that inquiry—the commission of a tort *by the defendant* at issue—has not been pleaded as against the NAAA.[35]

Point Four: Plaintiffs Have Not Alleged—and Cannot Allege—a Legally Sufficient Conspiracy Claim Against the NAAA.

Any fair reading of the papers filed in connection with the pending motion reveals that plaintiffs have effectively conceded that the NAAA had no participation in the actual perpetration of the torts they alleged to have

---

[34] As noted above, in the Complaints and in the Memorandum in Opposition plaintiffs assign specific responsibility for providing weapons, supplies, and training, fund-raising, planning and perpetrating the March 11 attack to various of the defendants *other than* the NAAA. Moreover, the making of the public statements cited by plaintiffs cannot be said to constitute a tort, nor can plaintiffs' conclusory allegations concerning common objectives or association be said to constitute actionable tortious conduct by the NAAA.

[35] Indeed, an analysis of plaintiffs' principal legal authority, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), suggests that the torts alleged in the Complaints are not within the catalogue of torts which confer subject matter jurisdiction under Section 1350, namely, genocide, torture, slavery and summary state execution. *See* Blum & Steinhardt at 87-97.

suffered.[36] Plaintiffs are therefore compelled to rely *solely* upon their conclusory allegations of the NAAA's supposed involvement in a "conspiracy." Not only are such allegations without any foundation in fact, but plaintiffs have not bothered even to allege the occurrence of any conversations, meetings, correspondence, or plans, much less overt acts or conduct, by the NAAA, in furtherance of this imagined "conspiracy."[37]

The law is clear that "it is not enough merely to state that a conspiracy has taken place." 2A Moore's Federal Practice ¶ 8:17 [5] at 8-181 (2d ed. 1980). *Accord, Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy . . . without any supporting facts permits dismissal."); *Connor v. Real Title Corp.*, 165 F.2d 291, 294 (4th Cir. 1947) ("[The conspiracy] allegation is much too vague and general and must fall, since it is unsubstantiated by any facts disclosed in the pleading."); *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227 (3d Cir. 1941), *cert. denied*, 317 U.S. 672 (1942). *See also Ostrer v. Aronwald*, 567 F.2d 551 (2d Cir. 1977); *Powell v. Workmen's Compensation Board*, 327 F.2d 131 (2d Cir. 1964); *Jacobs v. Tenney*, 316 F. Supp. 151 (D. Del. 1970). The Court of Appeals for the Fifth Circuit dismissed for failure to

---

[36] See discussion at 2-3, above.

[37] It must be emphasized that, with the exception of the referenced statements of Professor Sharabi and Mr. Baroody that are discussed above, plaintiffs' Complaints and their Memorandum in Opposition contain absolutely no *factual* allegations that involve, or even implicate the NAAA in the March 11 incident.

state a claim, a complaint much like plaintiff's herein, for "conspiracy" to deprive plaintiff of constitutional rights and to subject plaintiff to cruel and unusual punishmemnt. The court explained its ruling, which is directly applicable here, as follows:

> The appellant has failed to allege any facts showing either the existence or the execution of the claimed conspiracy. The pleadings contain only bare allegations that the defendants conspired against the appellant and that as a result of this conspiracy, he was subjected to cruel and unusual punishment. These allegations contain mere bare bones and are totally without any fleshing to show a link between the alleged conspirators. They also fail "to allege any overt acts related to the promotion of the claimed conspiracy" . . . . In short, *the pleadings are merely conclusional and are completely without factual underpinnings. Such pleading is clearly insufficient.* "Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual support of the claim. General allegations of this kind unsupported by any factual statements have generally been rejected as insufficient." . . . "[T]he complaint must do more than merely state vague and conclusionary allegations respecting the existence [and operation] of a conspiracy."

Granville v. Hunt, 411 F.2d 9, 11 (5th Cir. 1969) (citations omitted, emphasis added, and bracketed language in original). It is clear that plaintiffs' allegations here of the NAAA's involvement in a conspiracy are totally inadequate. Accordingly, since the allegations against the NAAA are, in actuality, limited to the conspiracy allegation, such inadequacy requires dismissal of plaintiffs' claims against the NAAA.

Point Five: The Chilling Effect of the Pendency of These Cases Requires Plaintiffs to Come Forward with Evidence of NAAA Participation in the Allegedly Tortious Conduct or Suffer Dismissal of Their Claims.

In support of its Motion to Dismiss, the NAAA submitted an Affidavit containing specific denials of the conclusory allegations made by plaintiffs in their complaints. The Baroody Affidavit was based on the personal knowledge of the President of the NAAA at the time of the bus attack at issue. Plaintiffs should not now be permitted to rest merely on their unsupported assertions to survive the NAAA's motion.

It is well established in an analogous context that "a party cannot rest on the allegations contained in his complaint" to oppose successfully a motion that is supported by an affidavit or other evidence. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968); *Accord, Bloomgarden v. Coyer*, 479 F.2d 201 (D.C. Cir. 1973); *National Life Insurance Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971); *Richardson v. Rivers*, 335 F.2d 996 (D.C. Cir. 1964). Indeed, Rule 56(e) was specifically amended in 1963 "to overturn a line of cases . . . that had held that a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply by relying on a contrary allegation in a well-pleaded complaint." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159 n. 20 (1970). *See* Rule 56(e), Fed. R. Civ. P., and Advisory Committee Notes thereto.

Here, plaintiffs were presented with a clear challenge to their unsupported accusations against the NAAA. Mr. Baroody's Affidavit, sworn to and based upon his

personal knowledge, explicitly denied each of plaintiffs' allegations against the NAAA. Faced with such admissible evidentiary material, plaintiffs did nothing but hide behind their original vague and conclusory statements. They produced no factual basis whatsoever for their allegations; they merely misquoted irrelevant statements made years before the incident, made inflammatory, slanderous, and totally groundless accusations based upon speculation, unattributed hearsay and innuendo, and then, incredibly, urged this Court to "accept . . . as true" the allegations contained in their Complaints. The NAAA contends that plaintiffs have not provided this Court with any *factual* allegations against the NAAA that *could* be accepted as true by any reasonable person who has read the papers filed herein. Moreover, plaintiffs' constantly reiterated legal conclusions concerning the NAAA are directly contradicted by a sworn affidavit.

The NAAA recognizes, of course, that the pending motion is not technically one for summary judgment under Rule 56, Fed. R. Civ. P. Nevertheless, considering the serious First Amendment issues raised by plaintiffs, the NAAA submits that—in the face of the Baroody Affidavit—plaintiffs should not be permitted to rely "simply . . . on a contrary allegation in a well-pleaded complaint." *Adickes v. S. H. Kress & Co.*, 398 U.S. at 159 n. 20. The Ninth Circuit has recognized that the mere pendency of actions touching Constitutionally protected rights imposes a chilling effect on Constitutionally protected activities. The Court of Appeals said:

> [W]e . . . hold . . . that in any case . . . where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, *the danger that the mere pendency of*

the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977) (emphasis added). Plaintiffs' Memorandum in Opposition makes clear that the only conduct of which they complain as against the NAAA is "prima facie protected by the First Amendment." Therefore, this Court should not take the boilerplate, nonspecific allegations of the Complaints as given for purposes of the NAAA's pending motion.

CONCLUSION

Plaintiffs should not be permitted to continue their present actions against the NAAA. Those actions should be dismissed for expiration of the limitations period, for lack of jurisdiction, and for lack of specificity. At a minimum, plaintiffs should not be permitted to pursue these actions without first coming forward with at least a scintilla of evidence to link the NAAA with the tortious acts complained of, and with a more specific statement of the acts of the NAAA upon which their actions are purportedly based.

Respectfully submitted,

HILL, CHRISTOPHER AND
PHILLIPS, P.C.

By: Cherif Sedky
Lawrence Coe Lanpher
Karla J. Letsche

1900 M Street, N.W.
Washington, D.C. 20036
(202) 452-7000

Attorneys for Defendant National Association of Arab Americans, Inc.

Dated: May 21, 1981
Washington, D.C.

APPENDIX E

In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Nos. 81-1870, 81-1871

HANOCH TEL-OREN, *et al.*,

Appellants

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Appellees

Appeal from the United States
District Court for the
District of Columbia

BRIEF FOR THE APPELLANTS,
HANOCH TEL-OREN, et al.

OREN R. LEWIS, JR.
RICHARD H. JONES
MICHAEL S. MARCUS
WILLIAM E. DONNELLY
LEWIS, WILSON, LEWIS &
JONES, LTD.
2054 North Fourteenth Street
Arlington, Virginia 22216

In The
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Nos. 81-1870 and 81-1871

HANOCH TEL-OREN, *et al.*,

Appellants

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

CERTIFICATE REQUIRED BY RULE 8(c)
OF THE GENERAL RULES OF THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for appellants Hanoch Tel-Oren, et al., certifies that the following listed parties appeared below:

Hanoch Tel-Oren, Individually and
in his capacity as father,
on behalf of the deceased,
Imry Tel-Oren;

Sharona Tel-Oren;

Adiel Tel-Oren;

Reviva Tel-Oren, a minor, suing by and through her guardian and next friend, Hanoch Tel-Oren;

Nir Tel-Oren;

Joseph Hochman, individually and in his capacity as husband and father, on behalf of the deceased, Rebecca Hochman, Ilan Hochman and Roy Hochman;

Monique Enekave, individually and in her capacity as wife and mother, on behalf of the deceased, Chaviv Enekave, Isaac Enekave and Galit Enekave;

Tal Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Anat Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Adina Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Adina Haloune, individually and in her capacity as wife, on behalf of the deceased, Joseph Haloune;

Tamar Elefand, individually and in her capacity as wife and mother, on behalf of the deceased, Erez Elefand;

Ronit Elefand, a minor, suing by and through her guardian and next friend, Tamar Elefand;

Maya Susinsky Schur, individually and in her capacity as daughter, on behalf of the deceased, Joseph Susinsky and Rena Katia Susinsky;

Eliezer Kroytatro;

Isaac Amir;

Ettel Sacherbrot;

Isaac Mishkal, individually and in his capacity as father, on behalf of the deceased, Yoav Mishkal;

Rachel Mishkal;

Ruth Mishkal, a minor, suing by and through her guardian and next friend, Isaac Mishkal;

Joseph Hadany, individually and in his capacity as father, on behalf of the deceased, Naama Hadany;

Levana Hadany;

Ayelet Hadany, a minor, suing by and through her guardian and next friend, Joseph Hadany;

Simacha Gal-On, individually and in his capacity as father, on behalf of the deceased, Liat Gal-On;

Shoshana Gal-On;

Idan Gal-On, a minor, suing by and through his guardian and next friend, Simacha Gal-On;

Lily Glottman, individually and in her capacity as wife, on behalf of the deceased, Simon Glottman

Anat Glottman, a minor, suing by and through her guardian and next friend, Lily Glottman;

Ilan Glottman, a minor, suing by and through his guardian and next friend, Lily Glottman;

Carmela Rosner, individually and in her capacity as wife, on behalf of the deceased, Tuvia Rosner;

Mordechai Shefer;

Tova Aharonovits, individually and in her capacity as mother, on behalf of the deceased, Revital Aharonovits;

Gideon Haas;

Miriam Haas;

Michelle Haas, a minor, suing by and through her guardian and next friend, Gideon Haas;

Tal Haas, a minor, suing by and through her guardian and next friend, Gideon Haas;

Shlomo Zait, in his capacity as father, on behalf of the deceased, Mordecai Zait;

Ruth Drory, individually and in her capacity as wife, on behalf of the deceased, Amnon Drory;

Michael Drory, a minor, suing by and through his guardian and next friend, Ruth Drory;

Ayelet Drory, a minor, suing by and through her guardian and next friend, Ruth Drory;

Albert Ashkenazi, individually and in his capacity as husband, on behalf of the deceased, Mathilda Ashkenazi;

Yechiel Leibovici, individually and in his capacity as husband, on behalf of the deceased, Malca Leibovici;

Manashe Malca;

Eve Malca;

Abraham Shamir;

Iris Shamir, a minor, suing by and through her guardian and next friend, Abraham Shamir;

Ayelet Shamir, a minor, suing by and through her guardian and next friend, Abraham Shamir;

Esther Menashrov, in her capacity as wife, on behalf of the deceased, Utri Menashrov;

Jacob Besterman, in his capacity as father, on behalf of the deceased, Judah Besterman

Simon Segev, in his capacity as father, on behalf of the deceased, Jacob Segev;

Judith Eshet, in her capacity as wife, on behalf of the deceased, Zvi Eshet;

Isaac Vachs;

Nessa Schwarz;

Joseph Savechnik;

Ella Savechnik;

Abraham Perets;

Shlomo Zait;

Judith Zait;

Gabriel Zait, a minor, suing by and through his guardian and next friend, Shlomo Zait;

Yfaat Zait, a minor, suing by and through her guardian and next friend, Shlomo Zait;

Alexander Jaacobi;

Ella Jaacobi;

Oded Jaacobi, a minor, suing by and through his guardian and next friend, Tirtza Jaacobi;

Uzy Aviasaf;

Bruria Aviasaf;

Michelle Aviasaf, a minor, suing by and through her guardian and next friend, Uzy Aviasaf;

Esther Aviasaf, a minor, suing by and through her guardian and next friend, Uzy Aviasaf;

Bilhah Sela;

Alegra Cohen, in her capacity as mother and mother-in-law, on behalf of the deceased, Ziona Luzia and Abraham Luzia;

Jacob Polak, individually and in his capacity as father, on behalf of the deceased Shlomo Polak.

All of the above-listed persons appeared as plaintiffs.

The following parties appeared as defendants:

National Association of Arab Americans;

Palestine Congress of North America;

Palestine Information Office.

The following parties were named as defendants and served in the District Court, but did not enter a formal appearance:

Libyan Arab Republic;

Palestine Liberation Organization.

Pursuant to an agreement, this appeal is not being pursued against the Palestine Congress of North America, one of the party-defendents in the District Court. An appropriate Motion, consistent with this Agreement, will be filed in this Court within the next few weeks.

These representations are made in order that Judges of this Court, *inter alia*, may evaluate possible disqualifications or recusal.

MICHAEL S. MARCUS
Attorney of Record for
Hanoch-Tel-Oren, et al.

TABLE OF CONTENTS

Page

1. Table of Contents viii
2. Table of Authorities xi
3. Statement of Issues Presented by this Appeal 1
4. Statement Required by Rule 8(b) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit 2
5. References to Parties and Rulings 3
6. Statutes and Regulations 5
7. Statement of the Case 8
8. Statement of Facts 10
9. Summary of the Argument 18
10. Argument 20

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE ALIEN TORT STATUTE, 28 U.S.C. §1350, DID NOT AFFORD A BASIS FOR SUBJECT MATTER JURISDICTION OVER THE TORT CLAIMS OF THE ALIEN APPELLANTS IN THE INSTANT CASE 20

A. The District Court Held that 28 U.S.C. §1350 did not Afford a Basis for Subject Matter Jurisdiction Notwithstanding that Torts were Committed in Violation of International Law, that the Appellants were Injured Thereby, that a Purpose of this Tortious Conduct was to Affect United States Foreign Policy and that Acts in Furtherance of these Torts were Committed Within the United States 20

B. The District Court's Conclusion that, in Order to Demonstrate Jurisdiction Under

Page

28 U.S.C. §1350, an Injured Person Must Point to a Specific Provision of International Law which Expressly or Impliedly Creates a Private Cause of Action for the International Law Violation Constitutes an Incorrect Interpretation of 28 U.S.C. §1350 22

1. The Interpretation Given to 28 U.S.C. §1350 by the District Court Conflicts Directly with the Decision of the Second Circuit in *Filartiga* v. *Pena-Irala*.. 22

2. A Cause of Action Arises from the Federal Common Law for Torts Committed in Violation of the Law of Nations 25

3. The Tortious Conduct of the PLO Terrorists and Those Who Acted in Concert with them Violated the Law of Nations 29

4. The Allegations of Tortious Conduct and Conspiracy by the NAAA and PIO were Sufficiently Specific to Withstand a Motion to Dismiss Ruled Upon Before any Discovery was Permitted to be Conducted 33

5. The PLO and Libya, by Obtaining Weapons, Funds and Terrorist Instructors in the United States and by Attempting to Disrupt United States Foreign Policy, Impliedly Consented to the Jurisdiction of the United States Courts to Adjudicate Claims Arising out of this Conduct 34

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT 28 U.S.C. §1331 DID NOT PRO-

Page

VIDE A BASIS FOR SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF THE APPELLANTS WHO ARE UNITED STATES CITIZENS 35

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE VIOLATIONS OF THE TREATIES OF THE UNITED STATES ALLEGED BY APPELLANTS COULD NOT PROVIDE A BASIS FOR SUBJECT MATTER JURISDICTION UNDER EITHER 28 U.S.C. §1331 OR U.S.C. §1350 36

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLANTS' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS 43

A. Appellants' Causes of Action in Count I of the Complaints for Intentional Infliction of Emotional Distress and Intentional Infliction of Cruel, Inhuman and Degrading Treatment are not Barred by the One-Year Limitation Period Provided for in D.C. Code §12-301(4) Because they are not among the Torts Specifically Enumerated Therein 43

B. Appellants' Claims in Counts II, III and V are Governed by the Three-Year Statute of Limitations Set Forth in D.C. Code §12-301(8) 45

C. Irrespective of which Statute of Limitations is Found to be Applicable, None of the Claims of the Minor Appellants can be Barred by the Statute of Limitations 49

11. Conclusion 50

TABLE OF AUTHORITIES

Cases Page

Asakura v. *City of Seattle*, 265 U.S. 332 (1924) 37

Bacardi Corporation v. *Domenech*, 311 U.S. 150 (1940) 37

Balfour, Gutherie & Company v. *United States*, 90 F. Supp. 831 (N.D. Cal. 1950) 42

* *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) 25

Bell v. *Hood*, 327 U.S. 678, 682 (1946) 42

Cassel v. *Taylor*, 100 U.S. App. D.C. 153, 243 F.2d 259 (1957) 48

Diggs v. *Richardson*, 180 U.S. App. D.C. 376, 555 F.2d 848 (1976) 39, 40, 41

Duke Power Co. v. *Carolina Environmental Study Group, Inc., et al.*, 438 U.S. 59 (1973) 42

Fernandez v. *Wilkinson*, 505 F.Supp. 787 (D. Kan. (1980) 29

* *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 22, 23, 24, 25, 26, 28, 30, 32, 35, 41, 46

Forrestal Village, Inc. v. *Graham*, 179 U.S. App. D.C. 225, 551 F.2d 411 (1977) 48

Gibson v. *Gibson*, 240 Ark. 827, 402 S.W.2d 647 (1966) 44

Hartigh v. *Latin*, 158 U.S. App. D.C. 289, 485 F.2d 1068 (1973), *cert. denied* sub nom: *District of Columbia* v. *Marsh*, 415 U.S. 948 (1974) 42

Huynh Thi Anh v. *Levi*, 586 F.2d 625 (6th Cir. 1978) 40

* *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) ..26, 36

* *Jack Loecks Enterprises, Inc.* v. *W. S. Butterfield Theatres*, 13 F.R.D. 5 (E.D. Mich. 1952) 33

Page

* *Laffey* v. *Northwest Airlines, Inc.*, 185 U.S. App. D.C. 322, 567 F.2d 429 (1976), *cert. denied*, 436 U.S. 1086 ..... 47, 48

Laffey v. *Northwest Airlines, Inc.*, 481 F.Supp. 199 (D.D.C. 1974) 48

Mathews v. *Travelers Indemnity Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968) 45

* *Payne* v. *Government of the District of Columbia, et al.*, 182 U.S. App. D.C. 188, 559 F.2d 809 (D.C. Cir. 1977) 42, 46, 47

Shear v. *National Rifle Ass'n. of America*, 196 U.S. App. D.C. 344, 606 F.2d 1251 (1979) 21

Sonne v. *Sachs*, 314 A.2d 194 (Del. 1978) 45

* *The Head Money Cases*, 112 U.S. 580 (1884) ..37, 38, 40

* *The Paquete Habana*, 175 U.S. 677 (1900) 25, 26

* *The People of Saipan* v. *United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974) 38, 39

* *Trans-Bay Engineers and Builders, Inc.* v. *Hills*, 179 U.S. App. D.C. 184, 551 F.2d 370 (1976).. 36

United States v. *A. L. Burbank and Company, Ltd.*, 525 F.2d 9 (2d Cir. 1975) 37

United States v. *Klintock*, 18 U.S. (5 Wheat.) 144 (1820) 28

United States v. *Pirates*, 18 U.S. (5 Wheat.) 184 (1820) 28

United States v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) 25, 26

United States v. *Steinberg*, 478 F. Supp. 29 (N.D. Ill. 1979) 42

Statutes Page

* 28 U.S.C. §1331 .....1, 2, 18, 19, 28, 35, 36

* U.S.C. §1350 .....1, 2, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 34, 35, 36, 42, 48

D.C. Code §12-301(4) 2, 43, 44, 45

* D.C. Code §12-301(8) 44, 45, 47, 48, 49

* D.C. Code §12-302(a)(1) 20, 49

International Materials

Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Counsel Resolution 276 (1970) [1971] ICJ 16 32

Convention on the Prevention and Punishment of the Crime of Genocide, U.N. General Assembly Resolution 260 (III) (December 6, 1948) ..29, 30

Declaration of the Rights of the Child, U.N. General Assembly Resolution 1386 (XIV) (1959) 30

* Declaration on the Protection of All Persons From Being Subject to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, (U.N. Declaration 1975) 31, 32

European Convention on the Suppression of Terrorism (November, 1976) 30

European Convention for the Protection of Human Rights and Fundamental Freedoms 29

Geneva Convention for the Prevention and Punishment of Terrorism, (November 1, 1937) 30

* Geneva Convention for the Protection of Civilian Persons in Time of War, (August 12, 1949) 30

International Covenant on Economic, Social and Cultural Rights 29

Page

Nuclear Tests (Australia v. France), Judgment of December 20, 1974 [1974] ICJ 253 32

Organization of American States, Convention to Prevent and Punish Acts of Terrorism, (February 2, 1971) 30

Principles of the Law of Nations Against Committing Terrorism on Civilian Populations, U.N. General Assembly Resolution 2444 (XXIII) (1968) 30

* Protocol I to Geneva Convention Relating to the Protection of Victims of International Armed Conflicts, (June 8, 1977) 30

* United Nations Charter (signed June 26, 1945) 29

* Universal Declaration of Human Rights, U.N. General Assembly Resolution 217A (III), (December 6, 1948) 29, 30

Miscellaneous Authorities

51 Am. Jur. 2d, Limitation of Actions, §63 (1970) .. 45

* Blum & Steinhardt, *Federal Jurisdiction of International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, Harvard International Law Journal, Vol. 22, No. 1 (Winter, 1981) 27, 28, 46

New Code for the Protection of Civilian Populations and Property During Armed Conflict, Ionel Closca, International Review of the Red Cross, November-December, 1980 31

Prosser, *Law of Torts*, (4th Ed. 1971) §12 43

Restatement (Second) of the Law of Torts §46 (1977) 43

The Terror Network, Claire Sterling, Holt, Reinhart and Winston (1981) 16

Wright & Miller, Federal Practice and Procedure: Civil, §1233 at 181 (1969) 33

*Cases or authorities chiefly relied upon are marked by asterisks.

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1870 and 81-1871

HANOCH TEL-OREN, *et al.*,

Appellants

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS, HANOCH TEL-OREN, ET AL.

STATEMENT OF ISSUES PRESENTED BY THIS APPEAL

1. Whether the District Court erred as a matter of law in holding that 28 U.S.C. §1350, which provides *inter alia,* that an alien may bring an action for "a tort only, in violation of the Law of Nations" did not provide a basis for subject matter jurisdiction over the claims of the alien appellants alleging tortious acts in violation of the Law of Nations?

2. Whether the District Court erred as a matter of law in holding that 28 U.S.C. §1331 did not provide a basis for subject matter jurisdiction over the United States citizen-appellants' claims alleging tortious acts in violation of the Law of Nations, where the Law of Nations is recognized as part of federal common law?

3. Whether the District Court erred as a matter of law in holding that the violations of the treaties of the United States alleged by appellants could not provide a basis for subject matter jurisdiction under either 28 U.S.C. §1331 or 28 U.S.C. §1350?

4. Whether the District Court erred as a matter of law in holding that appellants' claims were barred by the one-year statute of limitations set forth in D.C. Code §12-301(4), where two of the torts alleged in Count I and all of the torts alleged in Counts II, III, and V of the Complaints, are not among the torts enumerated in §12-301(4)?

5. Whether the District Court erred as a matter of law in holding that the claims of all appellants were barred by the one-year statute of limitations set forth in D.C. Code §12-301(4), where many of the appellants and appellants' decedents had not attained or would not have attained eighteen years of age prior to one year before the filing of these actions?

STATEMENT REQUIRED BY RULE 8(b) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The pending case has not previously been before this Court, or any other court, under the same or similar title. Counsel is unaware of any other related cases, either presently pending in this Court or in any other court, or that may be presented to this Court or to any other court in the future.

REFERENCES TO PARTIES AND RULINGS

Rulings

The order presented for review by this Court was entered in the form of a "Memorandum Opinion and Order" by United States District Judge Joyce Hens Green on June 30, 1981. J.A. Vol. II at 110a.

Parties

The Caption does not reflect the names of the following appellants:

Sharona Tel-Oren; Adiel Tel-Oren; Reviva Tel-Oren; Nir Tel-Oren; Joseph Hochman, individually and in his representative capacity; Monique Enekave, individually and in her representative capacity; Tal Enekave; Anat Enekave; Adina Haloune, individually and in her representative capacity; Tamar Elefand, individually and in her representative capacity; Ronit Elefand; Maya Susinsky Schur, individually and in her representative capacity; Eliezer Kroytatro; Isaac Amir; Ettel Sacherbrot; Isaac Mishkal, individually and in his representative capacity; Rachel Mishkal; Ruth Mishkal; Joseph Hadany, individually and in his representative capacity; Levana Hadany; Ayelet Hadany; Simacha Gal-On, individually and in his representative capacity; Shoshana Gal-On; Idan Gal-On; Lily Glottman, individually and in her representative capacity; Anat Glottman; Ilan Glottman; Carmela Rosner, individually and in her representative capacity; Mordechai Shefer; Tova Aharonovits, individually and in her representative capacity; Gideon Haas; Miriam Haas; Michelle Haas; Tal Haas; Schlomo Zait, in his representative capacity; Ruth Drory, individually and in her representative capacity; Michael Drory; Ayelet Drory; Albert Ashkenazi, individually and in his representative capacity; Yechiel Leibovici, in his

representative capacity; Manashe Malca; Eve Malca; Abraham Shamir; Iris Shamir; Ayelet Shamir; Esther Menashrov, in her representative capacity; Jacob Besterman, in his representative capacity; Simon Segev, in his representative capacity; Judith Eshet, in her representative capacity; Isaac Vachs; Nessa Schwarz; Joseph Savechnik; Ella Savechnik; Abraham Perets; Schlomo Zait; Judith Zait; Gabriel Zait; Yfaat Zait; Alexander Jaacobi; Ella Jaacobi; Oded Jaacobi; Uzy Aviasaf; Bruria Aviasaf; Michelle Aviasaf; Esther Aviasaf; Bilhah Sela; Alegra Cohen, in her representative capacity; Joseph Polak, individually and in his representative capacity.

The caption does not reflect the names of the following appellees: National Association of Arab Americans, Palestine Liberation Organization, Palestine Congress of North America, and Palestine Information Office.

STATUTES AND REGULATIONS

28 U.S.C. §1331:

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. As amended Oct. 21, 1976, Pub.L. 94-574, §2 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, §2(a), 94 Stat. 2369.* *Source: 28 U.S.C.A. §1331 (1981 pocket part)

28 U.S.C. §1350:

§1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. June 25, 1948, c.646, 62 Stat. 934.* *Source: 28 U.S.C.A. §1350 (1976).

D.C. Code §12-301:

§12-301. Limitation of time for bringing actions

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments—15 years;

(2) for the recovery of personal property or damages for its unlawful detention—3 years;

(3) for the recovery of damages for an injury to real or personal property—3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;

(5) for a statutory penalty of forfeiture—1 year;

(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;

(7) on a simple contract, express or implied — 3 years;

(8) on which a limitation is not otherwise prescribed —3 years.

This section does not apply to actions for breach of contracts for sale governed by §28:2-725. (Dec. 23, 1963, 77 Stat. 510, Pub.L. 88-241, §1, eff. Jan. 1, 1964; Aug. 30, 1964, 78 Stat. 677, Pub.L. 88-509, §2.)* *Source: D.C. Code Encyclopedia (1973 ed.)

D.C. Code §12-302:

§12-302. Disability of plaintiff

(a) Except as provided by subsection (b) of this section, when a person entitled to maintain an action is, at the time the right of action accrues:

(1) under 18 years of age; or

(2) *non compos mentis;* or

(3) imprisoned

he or his proper representative may bring action within the time limited after the disability is removed. (As amended Mar. 16, 1978, D.C. Law 2-61, §2, 24 DCR 6011.)* *Source: D.C. Code Encyclopedia (1973 ed., Sup. VII, 1980)

(b) When a person entitled to maintain an action for the recovery of lands, tenements or hereditaments, or upon an instrument under seal, is under any of the disabilities specified by subsection (a) of this section at the time the right of action accrues, he or his proper representative, except where otherwise specified herein, may bring the action within five years after the disability is removed, and not thereafter. (Dec. 23, 1963, 77 Stat. 510, Pub.L. 88-241, §eff. Jan. 1, 1964.)* *Source: D.C. Code Encyclopedia (1973 ed.)

STATEMENT OF THE CASE

Plaintiff-appellants initiated the actions which formed the basis of this appeal by filing complaints in the United States District Court for the District of Columbia on March 10, 1981. J. A. Vol. I at 1a. These actions arose out of a savage terrorist attack on March 11, 1978 by elements of the El Fatah branch of the Palestine Liberation Organization upon a civilian bus traveling down the main highway between Haifa and Tel Aviv, Israel. The complaints seek compensatory and punitive damages from the named defendants for tortious acts and conspiracy to

commit tortious acts in violation of international law and treaties and statutes of the United States; such tortious acts culminating in the March 11, 1978 attach. (sic). J.A., Vol. I at 15a-21a.

Plaintiffs in Civil Action No. 81-0563 were the personal representatives of twenty-nine persons who were murdered in the attack. Plaintiffs in Civil Action No. 81-0564 were sixty-five of the persons who were maimed in the attack. The named defendants in the two complaints were: the Libyan Arab Republic (Libya); the Palestine Liberation Organization ("PLO"); the Palestine Information Office ("PIO"); the National Association of Arab Americans ("NAAA"); and the Palestine Congress of North America ("PCNA").[1]

The liability of the appellee-PLO was predicated upon its actions in recruiting, training, directing and provisioning the thirteen terrorists who actually carried out the terrorist operation and in claiming responsibility for the attack. J.A. Vol. I at 18a-19a. Appellee-Libya was named as a party-defendant as a result of its actions in recruiting and training the terrorist instructors who trained the thirteen terrorists who carried out the March 11, 1978 attack, in supplying the weapons and other material used in the operation, in receiving and extending protection to the "mother ship," which brought the terrorists to the Israeli coast and in ratifying the actions of the terrorists. J.A., Vol. I at 19a. The liability of the appellees NAAA and the PIO is based upon their actions in funding and otherwise assisting the PLO so as to enable the PLO to carry out the March 11, 1978 attack and other similar terrorist operations. J.A., Vol. I at 20a-21a.

---

[1] The appeal is not being pursued against defendent-appellee PCNA, as a result of an agreement reached between the parties. Appellants will shortly be filing a Motion to Dismiss the Appeal as to appellee PCNA, such motion shall embody the agreement which has been made.

Appellee-NAAA filed an answer, denying the allegations of the complaint (J.A., Vol. I at 76a), and a Motion to Dismiss the complaints for Lack of Subject Matter Jurisdiction and for being Barred by the Statute of Limitations. J.A., Vol. I at 110a. Appellees PCNA and PIO filed motions for summary judgment. Appellees Libya and the PLO did not formally appear in the Court below. However, counsel representing appellee-Libya did attend the first status conference held by the District Court.

The District Court stayed all other proceedings pending a determination of the Motion of appellee-NAAA to Dismiss. Accordingly, appellants were precluded from undertaking any discovery in support of the allegations in the complaints.

On June 30, 1981, the District Court entered its Memorandum, Opinion and Order dismissing both actions for lack of subject matter jurisdiction and for being barred by the statute of limitations. J.A., Vol. II at 110a.

Appellants filed, on July 30, 1981, timely Notices of Appeal to this Court from the Order of the District Court dismissing the actions. These two cases were consolidated for purposes of this appeal by order of this Court, entered on August 27, 1981.

STATEMENT OF FACTS

On March 8, 1978, thirteen heavily armed terrorists, members of the El Fatah faction of the PLO, acting under the direction of the PLO, departed Lebanon by ship for Israel. The mission of these terrorists, as formulated by the PLO and its accomplice, Libya, was to capture and to hold as hostages Israeli civilians for the purpose of extorting the release of certain PLO terrorists in

Israeli jails. Complaint in Civil Action No. 81-0564 at ¶40, J.A., Vol. I at 15a. The plan called for the terrorists to demand that the British and Rumanian ambassadors to Israel and the United Nations representative in Israel surrender themselves as hostages to guarantee the safe conduct of the terrorists to Damascus aboard a United Nations plane.

The terrorists were ordered by the PLO and Libya to kill all the hostages if their mission at any stage did not proceed according to plan, regardless of whether the hostages were women, children and/or old, defenseless men. Both the PLO and Libya were well aware that it was the policy of Israel not to negotiate with terrorists or to agree to such an extorted release of PLO terrorists. The PLO and Libya, in constructing the mission, contemplated and anticipated a mass murder of civilians.

The terrorists landed by boat in Israel on Saturday, March 11, 1978. Upon landing, the terrorists encountered an unarmed photographer named Gail Rubin, who was a citizen of the United States. They immediately killed her without any justification or excuse. Complaint, *Ibid.*, at ¶41, J.A., Vol. I at 16a. The terrorists then made their way to the nearby Haifa-Tel Aviv Highway. This highway is strictly a civilian corridor. The highway had no military traffic, nor was there any legitimate objective adjacent to or near the highway. *Id.* at ¶42, J.A., Vol. I at 16a.

Upon reaching the highway, the terrorists came upon an unarmed civilian bus carrying families of the Egged Bus Company cooperative members returning to Haifa after a company outing. The terrorists fired upon the unarmed bus, killing and wounding children, as well as adults. The bus came to a halt. *Id.* at ¶43, J.A., Vol. I at

16a. At the same time, the terrorists stopped at gunpoint an unarmed civilian taxicab, seized the passengers as hostages, and brought them to the halted bus. *Id.* at ¶44, J.A., Vol. I at 16a. The terrorists fired at the bus passengers who were attempting to give aid to the wounded bus passengers outside the bus and also at those passengers who were trying to escape from the scene. Terrorists forced the passengers of the bus and the taxicab onto the bus. Meanwhile, the terrorists continued to fire at passing unarmed civilian automobiles, killing and wounding still more children and adults. One automobile was stopped, a civilian was taken hostage and was forced onto the bus with the other civilian hostages. *Id.* at ¶45, J.A., Vol. I at 16a.

The bus was then turned around toward Tel Aviv. The terrorists ordered the bus, together with the taxicab, to proceed toward Tel Aviv. Some of the terrorists sat on the roof of the taxicab and shot at the passing civilian cars. This action resulted in death and injury to additional unarmed civilians. *Id.* at ¶46, J.A., Vol. I at 16a.

As the bus and taxicab proceeded toward Tel Aviv, they eventually encountered a second unarmed Egged bus on a regularly scheduled trip from Tel Aviv to Haifa. This second bus was shot at and stopped by the terrorists, who seized the passengers of the second bus as hostages and forced them onto the first bus. The terrorists then continued to proceed toward Tel Aviv. *Id.* at ¶47, J.A., Vol. I at 16a-17a. On board the bus, the terrorists tied all the men to the seats with their hands behind their backs. They beat, humiliated and terrorized their civilian hostages, including the women and children. Several of the terrorists humiliated and tortured a sixteen year old military school student in full view of other hostages on the bus, and then cold-bloodedly murdered him. In the meantime, other terrorists were throwing hand grenades at passing civilian cars. *Id.* at ¶49, J.A., Vol. I at 17a.

Learning of these events, the civilian police attempted to stop the bus by means of a barricade consisting of police vehicles. The terrorists broke through the barricade, hurling hand grenades and firing at the police officers. The police finally managed to stop the bus by shooting at the tires and the engine. *Id.* at ¶51, J.A., Vol. I at 17a.

When the bus came to a halt, the terrorists fired upon the hostages in the bus and at the police officers and civilians outside the bus, killing and severely wounding still more of the hostages. *Id.*

The terrorists forced an adult male, Chaviv Enekave, to go outside the bus and deliver an alleged negotiation message to police officers. Just as Chaviv Enekave left the bus, the terrorists shot him in the back of the head, and killed him. Two of his children, seeing their father murdered before their very eyes, jumped up in anguish. The terrorists then shot and killed the children. At this time, the terrorists again began throwing hand grenades at the police officers and at the civilians outside the bus. *Id.* at ¶52, J.A., Vol. I at 17a.

Once the bus had come to a stop, many of the hostages inside the bus attempted to escape by climbing out of the bus windows. The terrorists shot at these hostages, killing and wounding many of them. The terrorists then began throwing hand grenades at the hostages in the back of the bus, killing and injuring still more of them. The bus started to burn from the hand grenades thrown by the terrorists. The terrorists, however, would not permit the hostages to leave the smoldering bus. *Id.* at ¶53, J.A., Vol. I at 17a-18a.

When the bus began to burn, the terrorists departed the bus, leaving heavy explosives behind in the bus. As

they departed the bus, the terrorists used a young female child as a shield. They then threw hand grenades in the bus, igniting the explosives. The bus exploded and burned, killing the remaining nineteen hostages, men tied to the seats, women and children. *Id.* at ¶ 54, J.A., Vol. I at 18a.

At no time during this entire incident did the terrorists encounter any forces of the Israeli military. *Id.* at ¶55, J.A., Vol. I at 18a.

As the result of the actions of the terrorists, twelve children and twenty-two adults were killed, and fourteen children and seventy-three adults were seriously injured. Many of those killed were burned alive in the smoldering bus. *Id.* at ¶56, J.A., Vol. I at 18a.

The survivors sustained serious and permanent physical injuries, including the loss of limbs, burns to all parts of their bodies, and incapacitating internal injuries. All of the survivors sustained serious and permanent mental, emotional and psychological injuries. Many of the survivors are incapable of pursuing their former professions or performing normal life functions. Lives have been ruined. Families have been destroyed. Almost all of the survivors lost members of their immediate families.

The surviving plaintiffs and the decedents were subjected to inhuman and barbaric treatment by the PLO terrorists. Every standard of human conduct accepted by the civilized world was violated by these terrorists. The victims were subjected to extreme torture, terror, humiliation, were held hostage and in thirty-four instances were brutally murdered. The actions of the terrorists went way beyond what might reasonably be classified as simply assault, battery and false imprisonment.

None of the victims were armed or able to defend themselves, nor were any of them members of the Israeli military or any armed civilian police unit. Most of the victims were women, children, babies and old men. Against this group of unarmed civilians, the PLO terrorists used bazookas, hand grenades, machine guns and other weapons of deadly force.

The terrorists did not even know the identity of their victims. These unfortunate human beings were selected at random by the PLO to be subjected to indiscriminate and barbaric violence. The victims were citizens of the United States, the Netherlands and the State of Israel.

The actions of the terrorists were subsequently applauded and ratified by official pronouncements of the PLO and the government of Libya.

The March 11 attack was not an isolated incident but was part of an overall plan designed by the PLO and Libya to wage a war of terror against unarmed Israeli civilians. In so doing, the PLO and Libya contemplated committing the act of genocide against the population of Israel. The March 11 attack was part of this act of genocide. All of the supporters of the PLO, including the American based defendants herein, knew that these were the objectives of the PLO at the time of and prior to the March attack.

Prior to the March attack, the PLO had engaged in terrorist raids on hospitals, nurseries and school buses; bombed crowded marketplaces and other areas where large numbers of the civilian population congregated; and otherwise had directed barbaric attacks against purely civilian populations in highly populated areas of Israel. The PLO had claimed responsibility for scores of such attacks. In addition, the PLO, together with Libya, on August 11, 1976, carried out an attack against passengers of an El Al plane in the Istanbul International Airport,

killing four passengers and injuring twenty-one; planned and carried out the massacre of Israeli athletes during the Munich Olympics in 1972; on August 5, 1973, engaged in an indiscriminate massacre at Athens Airport of passengers who had departed from a TWA plane which had arrived from Israel; and had conducted the infamous attack on civilian passengers at Lod International Airport in Israel.

One of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotions by destroying the positive efforts made in the Camp David accords. It was the intent of the PLO and Libya to conduct such a barbaric attack that would mandate a response by Israel against the Palestine guerrilla bases in southern Lebanon, thus setting off a chain of events which would create a climate making it impossible for any Arab government to negotiate with Israel or for that matter, with the United States. This is in part documented by the statements of the PLO itself and also in part by the increased number of terrorist actions within Israel during 1978.

In mid-February of 1978, the PLO set off a time bomb in a crowded Jerusalem bus, killing two persons and injuring forty-six. In August of that year, there were twenty-three bomb incidents in populated areas of Israel. On September 30, a PLO ship, loaded with explosives, set out for the seaside resort of Eilat, which at that time was filled with tens of thousands of persons celebrating the Jewish New Year. The ship was mounted with 42 Katyuska rockets and had four tons of dynamite aboard. The objective of the mission was to set ablaze with the rockets a huge oil dump on the outskirts of Eilat, set the ship's automatic pilot straight for the crowded beach, and cause the deaths of thousands of vacationers. Such a holo-

caust might actually have taken place but for the interception of the ship by an Israeli gunboat.[2]

The interest of the United States in and its involvement with the March 11 massacre goes even deeper. Libya, prior to this terrorist attack, obtained from within the United States sophisticated terrorist arms and equipment and recruited ex-United States Green Beret and CIA instructors, all for the purpose of assisting the PLO in its terror campaign against the Israeli civilian population. As part of this program, Libya contracted with fugitive Francis Terpil, a citizen of the United States, to organize a network in the United States to illegally obtain explosive devices, arms and terrorist instructors. Thousands of machine guns, missiles and explosive devices were obtained for the PLO by Francis Terpil with the aid of certain American based groups in sympathy with the PLO. In addition, Terpil recruited a team of American clandestine operatives, paramilitary specialists, professional killers and explosive experts trained by the CIA and the United States special forces to conduct terror training for PLO operatives.[3]

Much of the arms and equipment used by the terrorists in the March 11 attack were obtained by the PLO through Libya in this manner. The recruited team of American clandestine operatives trained in Libya the PLO instructors who in turn trained the very terrorists who conducted the attack on the plaintiffs herein.

Prior to the March 11 attack, the PLO was directly involved in raising funds within theUnited States in support of its terrorist campaigns.

---

[2] *The Terror Network,* Claire Sterling, Holt, Reinhart and Winston (1981) at p. 280.

[3] See the criminal indictment of Francis E. Terpil and others. J.A., Vol. II at 52a-72a.

Representatives of the PLO attended meetings of American-based groups sympathetic with the objectives and operations of the PLO for the purpose of soliciting an independent base of funds. Indicative of these efforts is a letter written on the stationery of the PLO's United Nations office and signed by Jacob Oubedi, the PLO's top fund raiser, thanking the Palestine committee in the State of Virginia for the money it had raised for the benefit of the PLO's operations.[4] The letter indicates that the money had been turned over to him by the PLO director in New York, Zoher Tarazi. The same Mr. Tarazi has acknowledged in 1976 that Oubedi was in the United States for the purpose of raising funds for the operations of the PLO.[5]

With the knowledge of the aims, objectives and terrorist activities of the PLO, the NAAA funded, assisted in the funding, assisted the obtaining of arms, ratified, encouraged, apologized for and otherwise acted in furtherance of the PLO and Libyan plot to terrorize the civilian populations of Israel. These efforts culminated in the March 11 massacre, which was the worst terrorist attack in the history of Israel. In light of their actions in support of this terror campaign, the plaintiffs allege that the NAAA are legally responsible for the March 11 attack. The Palestine Information Office ("PIO") is the agent and alter ego of the PLO, and is responsible for all the actions of the PLO within and without the United States.[6]

---

[4] See the July 5, 1976 letter from Jacob Oubedi, J.A., Vol. II at 72a-73a.

[5] See the column of Jack Anderson, *Washington Post*, dated September 20, 1976, J.A., Vol. II at 74a-75a.

[6] See the Supplemental Registration Statement of the PIO filed with the Department of Justice for the six-month period ending October 24, 1979, J.A., Vol. II at 76a-85a, and the Report of the Attorney-General concerning the Foreign Agents Registration Act for the calendar year 1979. J.A., Vol. II at 86a-89a.

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in ruling that 28 U.S.C. §1350 did not provide a basis for subject matter jurisdiction over the tort claims of the alien plaintiff-appellants in the instant case. The holding of the District Court conflicts directly with the most recent decision of the United States Court of Appeals for the Second Circuit construing 28 U.S.C. §1350. The determination by the District Court that the existence of a private cause of action *in international law* is a prerequisite to jurisdiction under 28 U.S.C. §1350, misperceives the nature of the relationship between international law and the municipal law of the United States. Where, as in the instant case, a claim is asserted for torts in violation of international law, that law only defines the standard of conduct. The cause of action is generated from the law of the United States, in the form of federal common law.

The holding by the District Court that the allegations of tortious conduct and conspiracy directed at the NAAA and the PIO were too vague to state a cause of action against those defendant-appellees was erroneous. These allegations were sufficiently specific to withstand a motion to dismiss which was ruled upon prior to the opportunity to conduct any discovery.

The District Court's reasoning that the exercise of jurisdiction over the PLO and Libya pursuant to 28 U.S.C. §1350 would be improper because neither of these parties has consented to the jurisdiction of United States courts ignores important connections between the March 11, 1978 attack and the United States. Acts in furtherance of the March 11, 1978 terrorist attack were committed in the United States and that a primary purpose of the attack was to disrupt the foreign policy of

the United States. By obtaining weapons, equipment, funds and terrorist instructors in the United States, and by attempting to disrupt the foreign policy of the United States, Libya and the PLO impliedly consented to the jurisdiction of United States courts over claims arising out of this conduct.

The District's holding that the identification of a private right of action in international law was a prerequisite to jurisdiction over the claims of appellants who are United States citizens pursuant to 28 U.S.C. §1331, was erroneous as a matter of law. As with 28 U.S.C. §1350, when international law forms the basis of a tort claim under 28 U.S.C. §1331, international law provides only the definition of the wrong. The cause of action arises under the municipal law of the United States.

The ruling by the District Court that the violations of the treaties of the United States alleged by appellants did not provide a basis for subject matter jurisdiction under either 28 U.S.C. §1331 or 28 U.S.C. §1350 constituted reversible error. The treaties cited by appellants in the complaints satisfy the criteria utilized by the courts for determining that a treaty creates enforceable private rights.

The District Court erred as a matter of law in holding that appellants' claims were barred by the statute of limitations. The District Court incorrectly applied the one-year limitation period of the D.C. Code for certain intentional torts specifically enumerated therein to all of appellants' tort claims. Two of the tort claims in Count I of the complaints and all of the tort claims in Counts II, III and IV are not among the torts specifically enumerated in the one-year statute of limitations. Accordingly, these tort claims are governed by the general three-year statute of limitations in the D.C. Code for causes of action not otherwise specifically provided for.

Moreover, irrespective of which statute of limitations is found to be applicable, the claims of the appellants who did not reach eighteen years of age prior to one year before the filing of the complaints cannot be time-barred. D.C. Code §12-302 expressly provides that with respect to persons under eighteen years of age when their cause of action accrues, the running of the statute of limitations is tolled until they attain that age.

———o———

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE ALIEN TORT STATUTE, 28 U.S.C. §1350, DID NOT AFFORD A BASIS FOR SUBJECT MATTER JURISDICTION OVER THE TORT CLAIMS OF THE ALIEN APPELLANTS IN THE INSTANT CASE.

A. The District Court Held that 28 U.S.C. §1350 did not Afford a Basis for Subject Matter Jurisdiction Notwithstanding that Torts were Committed in Violation of International Law, that the Appellants were Injured Thereby, that a Purpose of this Tortious Conduct was to Affect United States Foreign Policy and that Acts in Furtherance of these Torts were Committed Within the United States.

28 U.S.C. §1350, otherwise known as the Alien Tort Statute, provides that:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort

> only, committed in violation of the law of nations or a treaty of the United States. 28 U.S.C.A. §1350 (1976).

In its Memorandum Opinion and Order holding that the appellants' claims were not within the subject matter jurisdiction of the federal courts, the District Court did not deny that the acts alleged in the two complaints were torts; nor did the Court deny that these torts constituted violations of the Law of Nations.[7] The Court also did not deny that the appellants were injured as a proximate result of the tortious conduct alleged. The Court accepted, as it was obligated to for purposes of deciding a motion to dismiss,[8] appellants' uncontradicted allegations that a purpose of the tortious conduct was to affect the foreign policy of the United States and that acts in furtherance of the tortious conduct were committed within the United States.

While not disputing any of the premises stated above, the District Court nonetheless held that 28 U.S.C. §1350 did not provide for subject matter jurisdiction over appellants' claims in the federal court. The Court's apparent rationale for this conclusion was twofold.

Analogizing international law to a federal statute, the District Court stated:

---

[7] The Court stated that "The question of whether the conduct complained of here violated the law of nations [is] a question the court does not reach . . ." Memorandum Opinion and Order at 4, J.A., Vol. II at 125a.

[8] *Shear* v. *National Rifle Ass'n of America*, 196 U.S. App. D.C. 344, 606 F.2d 1251 (1979) (decision on motion to dismiss for failure to state a claim would assume that allegations in complaint were true.)

> Somewhere in the law of nations . . ., the plaintiff must discern and plead a cause of action that, if proved, would permit the Court to grant relief. The plaintiffs cite no cause of action given to them by the law of nations. . . an action predicated on. . . general norms of international law must have as its basis a specific right to a private claim. Memorandum Opinion and Order at 10, J.A., Vol. II at 131a.

The District Court concluded that the allegations of the complaints did not demonstrate such a specific cause of action in international law. Hence, the Court reasoned, appellants' allegations of tortious conduct in violation of the Law of Nations did not suffice to establish subject matter jurisdiction pursuant to 28 U.S.C. §1350 or 28 U.S.C. §1331.

The Court further held that with respect to appellants' claims against the appellees, NAAA and PIO, the allegations of tortious conduct and conspiracy were "clearly insubstantial." Memorandum Opinion and Order at 9, J.A., Vol. II at 130a.

As will be demonstrated below, both of these grounds for the District Court's decision are premised upon an incorrect interpretation of the relevant principles of law. The Court's interpretation of the scope of subject matter jurisdiction under 28 U.S.C. §1350 is inconsistent with the language of the statute and the historical context in which it was enacted, as well as being in direct conflict with the most recent decision of the United States Court of Appeals for the Second Circuit construing the Alien Tort Statute. *See, Filartiga* v. *Pena-Irala,* 630 F.2d 876 (2d Cir. 1980). The Dismissal by the Court of appellants' allegations of tortious conduct and conspiracy against the NAAA and the PIO fails to recognize that plaintiffs confronted with a secret conspiracy are not obligated to allege

with specificity the particular overt acts constituting the conspiracy prior to the opportunity to obtain requisite specific facts through discovery.

B. The District Court's Conclusion that, in Order to Demonstrate Jurisdiction Under 28 U.S.C. §1350, an Injured Person Must Point to a Specific Provision of International Law which Expressly or Impliedly Creates a Private Cause of Action for the International Law Violation Constitutes an Incorrect Interpretation of 28 U.S.C. §1350.

1. The Interpretation Given to 28 U.S.C. §1350 by the District Court Conflicts Directly with the Decision of the Second Circuit in *Filartiga* v. *Pena-Irala.*

In *Filartiga* v. *Pena-Irala, supra,* the Second Circuit held that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, an Alien Tort Statute provides for jurisdiction in the federal courts.

The persons seeking to invoke the jurisdiction of the federal courts in *Filartiga* were Paraguayan citizens, the father and sister of another Paraguayan, Joelito Filartiga, who was tortured to death in Paraguay in retaliation for his father's political activities. *Id.* at 878. The defendant, Americo Norberto Pena-Irala, was the former Inspector General of Police in Asuncion, Paraguay and the alleged perpetrator of the death by torture.

The Filartigas brought an action for wrongful death against Pena-Irala, then living in Brooklyn, New York,

in the United States District Court for the Eastern District of New York. The decision of the Second Circuit in *Filartiga* v. *Pena-Irala, supra,* reversed the ruling of the district court dismissing the action for lack of subject matter jurisdiction.

In *Filartiga,* the Second Circuit found that subject matter jurisdiction existed in the federal courts despite the complete absence of any connection between the United States and the facts and circumstances giving rise to the claim. The sole connection between the United States and the case was that the defendant and one of the two plaintiffs were present in the United States at the time the action was commenced. The Court was also not deterred by the fact that the claim involved the relationship between a state and its own citizens.

Unlike the District Court herein, the Second Circuit did not require the Filartigas to demonstrate that a specific provision of international law either expressly or impliedly conferred upon them a private cause of action for the international law violations alleged. Instead, the Court simply stated:

> Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations. *Filartiga* v. *Pena-Irala, supra,* 630 F.3d at 884.

The Second Circuit then determined that the Alien Tort Statute did not exceed the scope of federal jurisdiction as conferred by Article III of the Constitution because the Law of Nations has always been part of the law of the United States. 630 F.2d at 885-887. Having estab-

lished these two fundamental premises, the Court concluded that:

> . . . there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations. 630 F.2d at 887.

Despite the numerous important parallels between *Filartiga* and the present case,[9] the District Court only referred to *Filartiga* once in the course of its opinion. As in *Filartiga,* the instant case involves aliens seeking to recover for tortious conduct in violation of universally-recognized norms of international law. The District Court, while implicitly rejecting *Filartiga,* never explained why the reasoning employed by the Second Circuit was not deemed persuasive.

The instant case provides an even clearer justification for the exercise of federal jurisdiction pursuant to 28 U.S.C. §1350 than did *Filartiga.* Unlike *Filartiga,* the instant case does not involve the relationship of a state and its own citizens. Extremely important connections existed between the United States and the facts giving rise to appellants' claims. As explained in the Statement of Facts, a primary purpose of the March 11, 1978 terrorist attack was to interfere with the foreign policy of the United States by disrupting the "Camp David" peace process. The Camp David peace process was a cornerstone of United States Middle East policy.

---

[9] There are also several important differences between the instant case and *Filartiga,* but these differences, as explained *infra,* make the present case even more appropriate for the exercise of jurisdiction pursuant to 28 U.S.C.§1350 than was *Filartiga.*

Moreover, many of the tortious acts committed in furtherance of the terrorist attacks, specifically the obtaining of needed funds, weapons equipment and terrorist instructors, took place within the territory of the United States. These important connections between the United States and the tortious acts giving rise to appellants' claims provide a greater justification for the exercise of federal court jurisdiction than would exist if all of the relevant acts took place outside of the United States and were otherwise unrelated to the United States.

2. A Cause of Action Arises from the Federal Common Law for Torts Committed in Violation of the Law of Nations.

The interpretation given to 28 U.S.C. §1350 by the District Court fundamentally misconceives the relationship between international law and the law of the United States. When, as in the instant case, a person seeks redress in federal court for a tort in violation of universally-recognized rights protected by the Law of Nations, the cause of action, as such, does not arise under international law. Instead, as the following discussion will demonstrate, international law supplies the normative principle or right, the violation of which creates a cause of action arising under the municipal law of the United States.

That the Law of Nations constitutes part of the law of the United States, as federal common law, has been established beyond dispute. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964); *The Paquete Habana,* 175 U.S. 677 (1900); *United States* v. *Smith,* 18 U.S. (5 Wheat.) 153 (1820). This recognition of the integral role of international law in the domestic law of the United States was consistent with the principle, generally accepted in both England and the American colonies in the

eighteenth century, that international law was part of the common law. *See, Filartiga* v. *Pena-Irala, supra.,* 630 F.2d at 886.

It is also settled that claims based on a federal common law "arise under" the law of the United States as that phrase is used in Article III of the Constitution. *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972); *Filartiga* v. *Pena-Irala, supra.*

The relevant principles of international law applicable to a particular case are to be ascertained by consulting international agreements, international custom, general principles of law recognized by civilized nations, judicial decisions recognizing and enforcing that law and the teachings of learned commentators. *The Paquete Habana, supra.; United States* v. *Smith, supra.; Filartiga* v. *Pena-Irala, supra.* In order to become judicially enforceable, a principle of international law must command the "general assent of civilized nations." *The Paquete Habana, supra,* 177 U.S. at 694; *Filartiga* v. *Pena-Irala, supra.*

On the other hand, no requirement exists that a principle of international law, generally recognized by civilized nations, contain an express or implied private right of action for its violation. Such a cause of action arises automatically under the federal common law once it has been demonstrated that a person has been injured by the violation of a generally recognized principle of international law. *See, Filartiga* v. *Pena-Irala, supra.*

Indeed, acceptance of the District Court's requirement that the existence of specific language expressly or impliedly conferring a private right of action be demonstrated would render the "Law of Nations" element of 28 U.S.C. §1350 a nullity. A provision in international law expressly or impliedly creating a private right of

action could exist only in a specific treaty or other international instrument. Accepting, *arguendo,* the District Court's position that customary international law must be ignored, the only way such a provision could be enforced in United States courts would be if the particular treaty or other international instrument was ratified as a treaty of the United States. The inclusion of the words "the Law of Nations" in 28 U.S.C. §1350 would thereby be rendered utterly superfluous.

The District Court's requirement of a specific private right of action, which necessitates an isolated analysis of the language of specific international documents, is also inconsistent with the manner in which customary international law evolves. As one commentary explains:

> . . . international instruments [are] not . . . necessarily binding by themselves, but . . . [are] incremental building blocks of an order which can be seen with increasing clarity as the number and authoritativeness of supporting instruments mount. To determine whether an obligatory norm has been created, one is advised to look at the number and intended legal status of instruments addressing the norm, the language used in the documents, including the nature of proposed sanctions, and the specificity with which the event or conduct is defined; the connection of the item's content with previous prescriptions, and whether it appears to have the overwhelming support of states. Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala,* 22 Harv. Int. L.J. 53, 73-74 (1981).

As Blum and Steinhardt indicate, it is the multiplicity and specificity of the international documents de-

fining the norm of behavior, together with the extent to which the norm has received the overwhelming acceptance of civilized nations, which determines whether the norm becomes a principle of international law enforceable in a domestic court.

The District Court's insistence that a cause of action be somewhere located in international law as a prerequisite to a federal jurisdiction also ignores a fundamental distinction between the meaning of the term "arising under the laws of the United States" as used in the general federal question statute, and the term "in violation of international law" as used in the Alien Tort Statute. Had the first Congress, in enacting the Alien Tort Statute, provided that the district courts would have jurisdiction over tort actions by aliens *"arising under* the Law of Nations," the District Court's construction of the statute might be correct. The use of different formulations in 28 U.S.C. §1350 and 28 U.S.C. §1331 was, however, purposeful. The language "arising under" pinpoints the source of law from which the cause of action generates. The language "in violation of" denotes the standard of conduct to be applied to an otherwise existing cause of action. The first Congress was well aware that the Law of Nations was part of the law of the United States, as federal common law. In enacting 28 U.S.C. §1350, Congress was doing no more than extending to aliens a right which was possessed by citizens pursuant to 28 U.S.C. §1331. That right was the right to bring an action for a tort committed in violation of a right protected by international civil law.

The reason Congress decided to extend this right to aliens was related to the eighteenth century legal doctrine of *hostis humani generis.* The essence of this doctrine is "that certain acts specified as universally reprehensible would make the perpetrator liable to capture and trial

wherever he went." Blum and Steinhardt, *supra.* at 60. This doctrine has been applied regardless of the nationality of the perpetrator or the victim, or the locus of the crime. The United States Supreme Court has applied the doctrine of *hostis humani generis* to sustain the criminal prosecution of pirates for crimes committed on the high seas. *See, e.g., United States* v. *Klintock,* 18 U.S. (5 Wheat.) 144 (1820); *United States* v. *Pirates,* 18 U.S. (5 Wheat.) 184 (1820).

The Alien Tort Statute can best be understood as analogous, for purposes of civil liability, to the doctrine of *hostis humani generis.* The Second Circuit, in *Filartiga,* interpreted 28 U.S.C. §1350 in precisely this way, stating: "Indeed, *for purposes of civil liability,* the torturer has become—like the pirate and slave trader before him—*hostis humanis generis,* an enemy of all mankind." 630 F.2d at 890. (emphasis supplied)

In sum, the District Court's ruling that a private cause of action must be ascertained *in international law* as a predicate to jurisdiction under 28 U.S.C. §1350 constitutes a clear misinterpretation of that statute. For purposes of jurisdiction under 28 U.S.C. §1350, international law only defines the wrong—for which the municipal law of the United States supplies a remedy.[10]

---

[10] An apt illustration of this right/remedy distinction can be found in the decision of *Fernandez* v. *Wilkinson,* 505 F.Supp. 787 (D. Kan. 1980). In *Fernandez,* the District Court held that the alien petitioner could not claim any rights under the statutes or Constitution of the United States as a protection against indeterminate detention. The Court held, however, that this indeterminate detention did violate rights protected by customary international law as exemplified by the Universal Declaration of Human Rights and the American Convention of Human Rights. 505 F.Supp. at 798-799. The remedy for this wrongful detention was found in the municipal law of the United States—the writ of habeas corpus.

3. The Tortious Conduct of the PLO Terrorists and Those Who Acted in Concert with them Violated the Law of Nations.

The PLO terrorists committed the torts or terror, torture, hostage-taking and genocide against the plaintiffs. Each of these torts is in violation of the laws of nations.

Acts of terror, such as committed by the PLO members against the plaintiffs, are directly prohibited by many international agreements, including the United Nations Charter, J.A., Vol. I at 202a-222a, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, J.A., Vol. I at 255a-259a, the European Convention of the Protection of Human Rights and Fundamental Freedoms, the European Convention on the Suppression of Terrorism, the Geneva Convention for the Protection of Civilian Persons in Time of War (August 12, 1949), J.A., Vol. I at 165a-200a, the Geneva Convention for the Prevention and Punishment of Terrorism (November 16, 1937), the Declaration of the Rights of the Child, General Assembly Resolution 1386 (XIV) (1959), J.A., Vol. I at 260a-262a, the Principles of the Law of Nations Against Committing Terrorism on Civilian Populations Pronounced in General Assembly Resolution 2444 (XXIII) (1968), the Convention to Prevent and Punish Acts of Terrorism (February 2, 1971) of the Organization of American States and other acts, declarations and resolutions of international bodies.[11]

---

[11] The fact that some of these documents may not have been ratified or may not constitute treaties is totally irrelevant to the question as to what is the law of nations with regard to terror, torture, hostage-taking and/or genocide. See *Filartiga v. Pena-Irala*, supra.

Protocol I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted by the conference on June 8, 1977) is an extremely authoritative source to determine the Law of Nations as relating to terrorism in March, 1978. Article 51 of Protocol 1, entitled "Protection of Civilian Populations," provides as follows:

> (1) The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules which are additional to other applicable rules of international law shall be observed in all circumstances.
>
> (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian populations are prohibited.

The essence of Article 51 of Protocol 1 is to prohibit deliberate attacks on civilian populations, and acts or threats of violence of which the main aim is to terrorize the population by indiscriminate attacks. See *New Code for the Protection of Civilian Populations and Property During Armed Conflict,* Ionel Closca, International Review of the Red Cross, November-December, 1980. There simply can be no question that the PLO terrorists did exactly what is prohibited by the Law of Nations as documented by Article 51 of Protocol 1 to the Geneva Conventions of 12 August 1949.

Article 5 of the Universal Declaration of Human Rights provides: "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Article 3 of the Geneva Convention of 12 August 1949 Relating to the Protection of War Victims, states that the following acts "are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [persons taking no active part in hostilities]: (a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment."

The Convention on the Prevention and Punishment of the Crime of Genocide declares that genocide, whether committed in time of peace or in time of war, is a crime under international law. It defines genocide to mean, among other actions, the deliberate inflicting on the group of conditions of life calculated to bring about its physical destruction in whole or in part. This is of course, exactly what Libya and the PLO are attempting to do to the civilian population of Israel through terrorist actions such as the March 11 massacre.

The United Nations 1975 Declaration on the Protection of All Persons From Being Subject to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment is further evidence that the Law of Nations prohibits the cruel and barbaric actions of the PLO terrorists. Article II of that Declaration provides:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

The United States Court of Appeals for the Second Circuit in *Filartiga* v. *Pena-Irala,* supra, directly held that torture was in violation of the Law of Nations. The authorities cited in the Second Circuit decision, coupled with the reasoning in that opinion, necessitate a conclusion that torture, terror, hostage-taking, and acts of genocide are likewise in violation of and actionable under the Law of Nations. The decision of the Second Circuit is consistent with and supported by several decisions of the International Court of Justice, which confirm the existence of the customary international law of human rights.[12]

The number and specificity of international documents prohibiting the acts committed by the PLO terrorists, coupled with the general condemnation of terrorism by all civilized nations demonstrates (sic) a universal consensus that the torts of terror, torture, taking of hostages and the act of genocide which they committed are in violation of international law.

4. The Allegations of Tortious Conduct and Conspiracy by the NAAA and PIO were Sufficiently Specific to Withstand a Motion to Dismiss Ruled Upon Before any Discovery was Permitted to be Conducted.

The District Court also erred as a matter of law in holding that the allegations of tortious conduct and conspiracy by the NAAA and the PIO were insufficiently specific to state a cause of action. It is alleged that the NAAA, with knowledge of the aims, objectives and terrorist activities of the PLO, funded, assisted in the fund-

---

[12] *Nuclear tests (Australia v. France),* Judgment of December 20, 1974 [1974] ICJ 253; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Counsel Resolution 276* (1970) [1971] ICJ 16.

ing, assisted the obtaining of arms, ratified, encouraged, apologized for and otherwise acted in furtherance of the March 11, 1978 terrorist attack. See Complaint in Civil Action No. 81-0564 at ¶61, J.A., Vol. I at 20a. The Palestine Information Office is alleged to be the alter ego, agent and instrumentality of the PLO. See, *Id.* at ¶60. These allegations, if proven, will provide a more than adequate basis for imposing civil tort liability upon the NAAA and the PIO.

As indicated *infra* in the Statement of the Case, the District Court stayed all proceedings, *including discovery*, pending its determination of the NAAA's Motion to Dismiss. Appellants were thereby precluded from conducting any discovery which could have enabled them to state their allegations with greater specificity. It is recognized that "the very nature of a conspiracy is such that details of the acts that constitute it usually are unavailable or unknown to plaintiff until resort is had to discovery." *Jack Loecks Enterprises, Inc.* v. *W. S. Butterfield Theatres,* 13 F.R.D. 5, 8 (E.D. Mich. 1952); *See also,* Wright & Miller, Federal Practice and Procedure: Civil §1233 at 181 (1969). Accordingly, it was error for the District Court to hold that the allegations directed to the NAAA and the PIO were impermissibly lacking in specificity prior to any discovery.

5. The PLO and Libya, by Obtaining Weapons, Funds and Terrorist Instructors in the United States and by Attempting to Disrupt United States Foreign Policy, Impliedly Consented to the Jurisdiction of United States Courts to Adjudicate Claims Arising out of this Conduct.

In support of its ruling that the demonstration of a private right of action in international law is a prerequisite

to jurisdiction under 28 U.S.C. §1350, the District Court states that:

> Otherwise, federal courts would clutch power over cases, under the guise of the law of nations, undoubtedly casting effect upon international relations when no country, friend or foe, has consented to an American court opening its doors to one alleging violations of international legal principles. Memorandum Opinion and Order at 11, J.A., Vol. II at 132a.

This rationale ignores the facts that the actions of the PLO and Libya directly involved and have directly impacted upon the United States. As discussed in the Statement of Facts, the Libyans and the PLO engaged actively in fund-raising among sympathetic groups in the United States in support of this and other terrorist attacks. Libya and the PLO also recruited terrorist instructors and obtained weapons and other military equipment in the United States. In addition, one of the primary purposes of the March 11 terrorist attack was to disrupt United States foreign policy by crippling the Camp David peace process.

In view of these extensive connections between the March 11 terrorist attack and the United States, Libya and the PLO have impliedly consented to the jurisdiction of United States courts over claims arising out of their tortious conduct.

Other important considerations of public policy support the exercise of jurisdiction over the PLO and Libya pursuant to 28 U.S.C. §1350 under the circumstances of this case. Recognition that redress is available in United States courts against those who, using the United States as a base of operation, violate core human rights protected by international law will assist in securing these rights to

all people. The Second Circuit eloquently stated the public policy justification for giving 28 U.S.C. §1350 this interpretation at the close of its opinion in *Filartiga*:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilzed nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence. 630 F.2d at 890.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT 28 U.S.C. §1331 DID NOT PROVIDE A BASIS FOR SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF

THE APPELLANTS WHO ARE UNITED STATES CITIZENS.

For the same reasons as stated above with respect to 28 U.S.C. §1350, the District Court's holding that the existence of a private right of action must be demonstrated in international law as a prerequisite to 28 U.S.C. §1331 jurisdiction over claims of torts in violation of international law was an erroneous interpretation of that statute. As previously stated, international law is part of the law of the United States, as federal common law. Both the United States Supreme Court and this Court have held that claims based upon federal common law arise under the laws of the United States as that phrase is used in 28 U.S.C. §1331. *Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972); *Trans-Bay Engineers and Builders, Inc.* v. *Hills,* 179 U.S. App. 184, 551 F.2d 370 (1976). As with 28 U.S.C. §1350, when international law forms the basis of a tort claim under U.S.C. §1331, international law provides only the definition of the wrong. The cause of action arises under the municipal law of the United States.

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE VIOLATIONS OF THE TREATIES OF THE UNITED STATES ALLEGED BY APPELLANTS COULD NOT PROVIDE A BASIS FOR SUBJECT MATTER JURISDICTION UNDER EITHER 28 U.S.C. §1331 OR 28 U.S.C. §1350.

All of the appellants have causes of action arising under the enumerated treaties. These treaties, when considered in the context of their purpose, are the kinds of treaties which give rise to private causes of action under

28 U.S.C. §1331 and 28 U.S.C. §1350. Moreover, the criteria universally recognized by the courts for finding a treaty to give rise to a private cause of action are satisfied by the treaties relied upon by appellants in the complaints.

The interpretation and administration of these treaties presents a pivotal, substantive issue, the determination of which will have a direct impact on the appellants' success or failure. The claims of appellants involve construction of the treaties of the United States, which constitute laws of the United States. The sections of the treaties relied on are primarily of a judicial nature, can be interpreted by judicial tribunal, and confer rights upon individual citizens. The apparatus for effectuating the rights conferred by these treaties already exist in the judicial system of the United States and no new mechanisms need be enacted in order for the courts to enforce those rights.

The ratification of a treaty by the United States makes it the law of the United States. No legislation is necessary to give it the effect of law. This principle was confirmed by the United States Supreme Court in *Asakura* v. *City of Seattle,* 265 U.S. 332 (1924), in which the Court states at p. 341: "It [a treaty] stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." The same holding was reached by the United States Supreme Court later, in *Bacardi Corporation* v. *Domenech,* 311 U.S. 150 (1940). See also, *United States* v. *A. L. Burbank and Company, Ltd.,* 525 F.2d 9 (2d Cir. 1975).

The test as to when treaties which are part of the law of the United States confer private rights on citizens of

the United States was structured by the United States Supreme Court in *The Head Money Cases,* 112 U.S. 580 (1884). The ruling in this case has been the fundamental basis utilized by federal courts to consider the question of private rights created by treaties. The Court held as follows:

> . . . a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is the law of the land as an act of Congress is, whenever its provisions proscribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for the rule of decision for the case before it as it would to a statute.

An examination of the treaties cited in the complaints demonstrates (a) that they confer certain rights on individuals; (b) that these rights partake of the nature of municipal law; and (c) they are capable of being enforced as between private parties in the courts of this country without the enactment of any new legislation. Consequently, these treaties, pursuant to the ruling of the Supreme Court in *The Head Money Cases,* give rise to pri-

vate causes of action and those causes of action are to be enforced in the federal courts.

An instructive case concerning the existence of private rights pursuant to the kind of treaties enumerated by the appellants is *The People of Saipan* v. *United States Department of Interior,* 502 F.2d 90 (9th Cir. 1974). The plaintiffs in the *Saipan* case claimed they had a private right of action based on the Trusteeship Agreement pursuant to which the United States was authorized to administer the territory of Micronesia. The court found that the plaintiffs indeed had a private right of action pursuant to that Agreement and more specifically, pursuant to the section of the Agreement which provided that the United States was required to "promote the economic advancement and self-sufficiency of the inhabitants, and to this end . . . regulate the use of natural resources" and to "protect the inhabitants against the loss of their lands and resources . . ."On the basis of this language and this language alone, and without any enabling legislation, the Ninth Circuit reached this conclusion.

The Court in the Saipan case held that:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation, must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non self-execution. 502 F.2d at 97.

Relying on the test just quoted, the Court in *Saipan* held that the preponderance of features in the Trusteeship

Agreement suggest the intention to establish direct affirmative and judicially enforceable rights.

> The issue involves the local economy and environment, not security; the concern with natural resources and the concern with political development are explicit in the agreement and are general international concerns as well; the enforcement of these rights requires little legal or administrative innovation in the domestic forum; and the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make the rights virtually unenforceable. 502 F.2d at p. 97.

Utilizing the test formulated by the Ninth Circuit, it would seem abundantly clear that the treaties relied upon by the appellants create private rights of action against the appellees in this case. The conferring of basic human rights, the freedom from torture, terror, being taken as a hostage and genocide, would seem to be even more appropriate for judicial enforcement than issues involving the local economy and the environment.

The cases relied upon by the District Court in its Memorandum do not necessitate a contrary conclusion. In *Diggs* v. *Richardson,* 180 U.S. App. D.C. 376, 555 F.2d 848 (1976), this Court was called upon to determine whether a United Nations Security Council resolution calling upon member states not to have any dealings with South Africa, created private rights of action. Firstly, it should be noted that the Court did not throw out the cause of action because it relied on a United Nations Security Council resolution, but instead, went ahead to examine the nature of that resolution to determine the possible rights of the plaintiffs. Therefore, this Court must have concluded that private rights of action can be premised upon United Nations Security Council resolutions.

Secondly, the nature of the resolution under consideration in ***Diggs*** was clearly geared to foreign relations of countries and not to judicially enforceable rights. Judge Leventhal in the opinion so found. Judge Leventhal, in reaching his opinion, adopted with approval the ruling of the Supreme Court in ***The Head Money Cases*** discussed above. The Court held at p. 851:

> Applying this kind of analysis [***The Head Money Cases*** analysis] to the particular Security Council Resolution on which plaintiffs rely, we find that the provisions here in issue were not addressed to the judicial branch of our government. They do not by their terms confer rights on individual citizens; they call upon governments to take certain actions.

Applying the test developed by Judge Leventhal and employing ***The Head Money Cases*** analysis, the contrary conclusion would be reached with regard to the treaties relied on by the appellants. Consequently, these treaties create a private right of action on behalf of the appellants.

The District Court, in its Memorandum, has relied upon ***Huynh Thi Anh*** v. ***Levi,*** 586 F.2d 625 (6th Cir. 1978) to support the proposition that the Geneva Convention Relative to Protection of Civilian Persons in Time of War, does not give rise to a cause of action with regard to the tortious conduct alleged in the complaints. A reading of that case indicates that it does not stand for that proposition at all. ***Levi*** was a habeas corpus action to obtain custody instituted by the grandmother and uncle of Vietnamese children brought to this country and placed with foster parents. What the Sixth Circuit said was that Articles 24 and 49 of that Convention relating to education of children separated from parents by war did not give rise to a private cause of action because *that language* was vague, very general, and "does not answer the

custody question presented by this case." In no way did the Sixth Circuit hold that the Convention could not under appropriate circumstances give rise to a private cause of action.

An examination of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, indicates that its essential purpose is directed to protecting the rights of persons who are civilians. It confers individual rights on such persons. It describes in detail that these individuals are to be free from acts of torture, terror, hostage-taking and genocide. The rights given to individuals are clear, enforceable and unmistakeable. They are enforceable in United States courts without the enactment of any new legislation and without the Congress providing any additional funds.

The Second Circuit in the *Filartiga* case stated that the Universal Declaration of Human Rights no "longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement' but is rather an authoritative statement of the international community." 630 F.2d at 883. As such, in applying the rationale of Judge Leventhal in the *Diggs* case, the Universal Declaration of Human Rights should be construed as creating private rights enforceable by this Court. It unquestionably confers individual rights and defines fundamental freedoms capable of being enforced by a judicial tribunal. Those rights are not inconsistent with, and in fact, are parallel to, our own Bill of Rights. To permit a private right of action under the Universal Declaration of Human Rights would do nothing more than permit the principles of our Bill of Rights to be utilized in cases involving aliens and actions outside of the United States. Such an application of fundamental human rights law is exactly what is mandated by the United States incorporating international law into its

federal common law, as is evidenced by the language of 28 U.S.C. §1350. [13]

Where a complaint is drawn so as to claim a right to recovery under the laws or treaties of the United States, the federal court has subject matter jurisdiction unless the federal question alleged is immaterial or wholly insubstantial and frivolous. *Hartigh* v. *Latin,* 158 U.S. App. D.C. 289, 485 F.2d 1068 (1973) *cert. denied* sub. nom. *District of Columbia* v. *Marsh,* 415 U.S. 948 (1974). If there is any foundation or possibility to the claim of federal question jurisdiction, then the Court is to deny a motion to dismiss on the basis of lack of federal question jurisdiction. *Payne* v. *Government of the District of Columbia,* 182 U.S. App. D.C. 188, 559 F.2d 809 (1977). These holdings of this Court are consistent with the ruling of the Supreme Court in *Duke Power Company* v. *Carolina Environmental Study Group, Inc., et al.,* 438 U.S. 59 (1973), when the court held:

> For purposes of determining whether jurisdiction exists under §1331(a) to resolve appellee's claims, it is not necessary to decide whether appellee's alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellee's] can actually recover." *Bell* v. *Hood,* 327 U.S. 678, 682 (1946). Instead the test is whether 'the cause of action alleged is so *patently without merit* as

---

[13] The United States District Court for the Northern District of Illinois, in *The United States* v. *Steinberg,* 478 F. Supp. 29 (1979), held, "the United Nations Charter, a treaty ratified by the United States, is a part of the supreme law of the land. *Balfour, Gutherie & Company* v. *United States,* 90 F.Supp. 831 (N.D. Cal. 1950)." As such, the Charter also would give rise to a private cause of action on behalf of the plaintiffs in this case since it too, confers individual rights capable of judicial enforcement.

to justify . . . the court's dismissal for want of jurisdiction." 438 U.S. at 70.

Certainly, it cannot be said that the assertion of federal subject matter jurisdiction based on the treaties enumerated by the appellants is so patently without merit, is so immaterial and so insubstantial as to warrant dismissal.

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT APPELLANTS' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

A. Appellants' Causes of Action in Count I of the Complaints for Intentional Infliction of Emotional Distress and Intentional Infliction of Cruel, Inhuman and Degrading Treatment are not Barred by the One-Year Limitation Period Provided for in D.C. Code §12-301(4) Because they are not among the Torts Specifically Enumerated Therein.

Section 12-301 of the D.C. Code provides a one-year statute of limitations for claims for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution and false imprisonment." D.C. Code §12-301(4). Two of the claims set forth in Count I of the complaint, specifically the claims for intentional infliction of emotional distress and intentional infliction of cruel, inhuman and degrading treatment, are not among those enumerated in §12-301(4). The District Court held that these two tort claims are "dependents of the same personal interests infringed by the intentional torts that would be subject in the District of Columbia to the one year limitation period." Memorandum Opinion and Order at 12-13, J.A., Vol. II at 133a-134a. This characterization of these two Count I claims is not correct.

The intentional infliction of emotional distress is recognized as an actionable tort, distinct and independent from the intentional torts of assault and battery. See Prosser, *Law of Torts,* (4th Ed. 1971) §12 at 56-59; Second Restatement of Torts, §46, Comment K. The surviving appellants and the decedents in these cases have suffered severe and permanent emotional trauma as a result of *inter alia* observing the killing and maiming of their loved ones and others during the course of this terrorist attack. The emotional distress engendered by experiencing these events is a compensable harm, wholly distinct from any personal injury or apprehension of personal injury which they themselves suffered. As a result, this cause of action is not governed by the one-year statute of limitations in D.C. Code §12-301(4).

Similarly, the intentional infliction of cruel, inhuman and degrading treatment is a tort distinct from those specifically enumerated in D.C. Code §12-301(4). This tort, while encompassing some of the same elements as battery and false imprisonment, is distinguished by the necessity of showing an intent to inflict treatment upon a person of such extreme barbarity as to be qualitatively different from mere unconsented to touching or unconsented to curtailment of freedom of movement. As a result, this cause of action is also not governed by the one-year statute of limitations in D.C. Code §12-301(4).

After listing in subsections, seven specific actions or sets of actions for which specific limitations periods are prescribed, the D.C. Code states: ". . . (8) for which a limitation is not otherwise *specially prescribed*—three years." D.C. Code §12-301(8). [Emphasis added] The inclusion of this general provision evidences a clear legislative intent that the seven preceding sections and the other limitations provisions scattered throughout the D.C.

Code were meant to apply only to the specific actions enumerated therein and to no others. See also *Gibson* v. *Gibson,* 240 Ark. 827, 402 S.W. .2d 647 (1966) (a statute of limitations applies only to those actions that are specifically enumerated therein). All causes of action not enumerated in one of these sections were to be governed by the three-year general statute of limitations contained in §12-301(8).

Moreover, where there is substantial doubt as to which of two periods of limitation is applicable, the longer periods should be held to apply. *Sonne* v. *Sachs,* 314 A.2d 194 (Del. 1978); *Mathews* v. *Travelers Indemnity Ins. Co.,* 245 Ark. 247, 432 S.W.2d 485 (1968), 51 Am.Jur.2d, Limitation of Actions §63 (1970).

Appellants' Count I claims for intentional infliction of emotional distress and intentional infliction of cruel, inhuman and degrading treatment are not barred by the statute of limitations because they were brought within the applicable three-year statute of limitations contained in D.C. Code §12-301(8).

B. Appellants' Claims in Counts II, III and V are Governed by the Three-Year Statute of Limitations Set Forth in D.C. Code §12-301(8).

The three-year limitation period provided for in D.C. Code §12-301(8) applies to the causes of action asserted in Counts II, III and V because no other limitation provision in the D.C. Code is analogous to these claims.

Counts II and III of the Complaint allege, respectively, tortious actions in violation of the Law of Nations and tortious actions in violation of the treaties of the United States.[14] The District Court held that the allega-

---

[14] Count V alleges a conspiracy to commit the aforementioned tortious actions.

tions in these counts merely apply different labels to the common law tort claims alleged in Count I and, hence, are governed by the one-year period of limitations prescribed by D.C. Code §12-301(4) for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution or false imprisonment." Opinion and Order at 12-13, J.A., Vol. II at 133a-134a. The District Court's holding fundamentally misperceives the nature of the claims alleged in Counts II, III and V.

A tort, generally speaking, is an invasion of a legally protected interest that results in compensable damage. See Blum and Steinhardt, *supra.*, at 88, note 140. The tort claims alleged in Counts II, III and V are qualitatively different from the common law intentional torts alleged in Count I. These tort claims are different from the common law tort claims asserted in Count I because the legally protected interests at stake and the nature and purpose of the tortious conduct at issue are different.

In Count II, appellants are seeking damages for injuries and death proximately resulting from the intentional invasion of interests protected by the Law of Nations. The Law of Nations does not protect a person from simple assault, battery or false imprisonment. Where, as in the instant case, internationally recognized human rights have been brutally violated by acts of terrorism aimed not just at the individual but also at the government of a state and the international community, federal common law affords a distinct right of recovery. See *Filartiga* v. *Pena-Irala, supra,* 630 F.2d at 888-889.

The treaties of the United States relied upon by plaintiffs in Count III protect those rights expressly or impliedly created by the language of the treaties which are distinct from and different in nature and kind from the simple torts of assault, battery and false imprisonment.

A rationale similar to that relied upon by the District Court herein, raised in support of a motion to dismiss for lack of subject matter jurisdiction, was rejected by this Court in *Payne* v. *Government of District of Columbia,* supra. In *Payne,* plaintiffs' asserted claims based upon violation of their Fifth Amendment rights arising out of the action of a District of Columbia police officer in allegedly wilfully and maliciously aiming and several times discharging a firearm at plaintiffs while they occupied an automobile. In the course of rejecting the District of Columbia's argument that the case was a simple tort case, the outcome of which depended exclusively on common law principles, the Court noted:

> It would appear that *the interests protected by Federal Constitutional law and local assault law are not congruent* and that *injuries inflicted by officers acting under color of state law are significantly different in kind from those resulting from acts of private persons. Payne* v. *Government of the District of Columbia,* supra, note 32, 182 U.S. App. D.C. at 196, 559 F.2d at 817 (per Robinson C.J. with Tamm C.J., concurring in the result). [Emphasis added]

Similarly, in the instant case, the legal injuries for which redress is sought and the legal interests that the federal causes of action asserted in Counts II, III and V seek to vindicate differ significantly in kind from those addressed by the common law torts of assault, battery and false imprisonment.

Where a person seeks vindication of a federal right (and this includes rights under the law of nations incorporated in the federal law) for which Congress has not prescribed a limitations period, the Federal Court will adopt the period of the most analogous statute of the

state in which it sits, unless adoption of this period would conflict with the federal policy underlying the cause of action or would amount to a discriminatory restriction of a federal right of action. *Laffey* v. *Northwest Airlines, Inc.*, 185 U.S. App. D.C. 322, 567 F.2d 429 (1976), *cert. denied*, 434 U.S. 1086.

Since the legal interests protected by the federal rights that form the basis for plaintiffs' claims in Counts II, III and V are "significantly different in kind" from those protected by the common law causes of action for assault, battery and false imprisonment, D.C. Code §12-301(8) is the most analogous state statute for plaintiff's federal claims. No D.C. Code limitation provision for specifically enumerated causes of action can be considered analogous. D.C. Code §12-301(8) provides in such a circumstance that the applicable period of limitations is three years. This provision has been held to be sufficiently broad to include enforcement of federally-created rights for which Congress did not provide a specific limitations period. *Cassel* v. *Taylor*, 100 U.S. App. D.C. 153, 243 F.2d 259 (1957); see also, *Laffey* v. *Northwest Airlines, Inc.*, 481 F.Supp. 199 (D.D.C. 1974). Since appellants' federal causes of action were brought within the three-year limitations period prescribed by D.C. Code §12-301(8), they are not barred by the statute of limitations.

Moreover, the one-year statute of limitations contained in the D.C. Code §12-301(4) must not be applied to bar any of the federal claims of any of the appellants because to do so would create a conflict with the federal policies underlying those causes of action.

One of the recognized exceptions to the application of the most analogous state statute of limitations to a federal claim for which no federal limitation has been

enacted is when to do so "would create important conflicts with the federal policy underlying the cause of action." *Laffey* v. *Northwest Airlines, Inc., supra.,* 185 U.S. App. at 359, 567 F.2d at 468.

In ratifying the treaties and enacting the statutes relied upon herein, including 28 U.S.C. §1350, it is reasonable to infer that Congress did not intend that the exercise of the federal rights thereby created was to be burdened by an unreasonably short state statute of limitations. This Court should borrow the particular limitations period prescribed by the District of Columbia "that best effectuates the federal policy involved." *Forrestal Village, Inc.* v. *Graham,* 179 U.S. App. D.C. 225. 227, 551 F.2d 411, 413 (1977). The federal policy underlying the creation of the federal rights relied upon by the plaintiff can best be effectuated by the borrowing of the three-year limitations period of D.C. Code §12-301(8), which would enable the federal claims of all plaintiffs to be vindicated.

C. Irrespective of which Statute of Limitations is Found to be Applicable, None of the Claims of the Minor Appellants can be Barred by the Statute of Limitations.

In holding that the claims of all appellants were barred by the statute of limitations, the District Court ignored the fact that thirty-four of the persons killed or maimed in this terrorist attack were under eighteen at the time of the attack, and did not attain the age of eighteen before one year prior to the filing of these complaints. D.C. Code §12-302 provides, in pertinent part, that:

> (a) except as provided by subsection (b) of this section, when a person entitled to maintain an action is, at the time the right of action accrues: (1) under 18 years of age; . . ., he or his proper representative

> may bring action within the time limit after the disability is removed.

Hence, none of the claims of any of the appellants in these actions who were under age 18 at the time the terrorist attack occurred, and did not reach age 18 before one year prior to the filing of the complaints, can be barred by the statute of limitations, irrespective of which statute of limitations is found to be applicable.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1870 and 81-1871

HANOCH TEL-OREN, *et al.*,

Appellants,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

CERTIFICATE REQUIRED BY RULE 8(c) OF THE
GENERAL RULES OF THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Appellee National Association of Arab Americans, Inc., certifies that the following listed parties appeared below:

Hanoch Tel-Oren, individually and
in his capacity as father,
on behalf of the deceased Imry Tel-Oren;

Sharona Tel-Oren;

Adiel Tel-Oren;

Reviva Tel-Oren, a minor suing by and through her guardian and next friend, Hanoch Tel-Oren;

Nir Tel-Oren;

Joseph Hochman, individually and in his capacity as husband and father, on behalf of the deceased, Rebecca Hochman, Ilan Hochman and Roy Hochman;

Monique Enekave, individually and in her capacity as wife and mother, on behalf of the deceased, Chaviv Enekave, Isaac Enekave and Galit Enekave;

Tal Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Anat Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Adina Enekave, a minor, suing by and through her guardian and next friend, Monique Enekave;

Adina Haloune, individually and in her capacity as wife, on behalf of the deceased, Joseph Haloune;

Tamar Elefand, individually and in her capacity as wife and mother, on behalf of the deceased, Erez Elefand;

Ronit Elefand, a minor, suing by and through her guardian and next friend, Tamar Elefand;

Maya Susinsky Schur, individually and in her capacity as daughter, on behalf of the deceased, Joseph Susinky and Rena Katia Susinsky;

Eliezer Kroytatro;

Isaac Amir;

Ettel Sacherbrot;

Isaac Mishkal, individually and in his capacity as father, on behalf of the deceased Yoav Mishkal;

Rachel Mishkal;

Ruth Mishkal, a minor, suing by and through her guardian and next friend, Isaac Mishkal;

Joseph Hadany, individually and in his capacity as father, on behalf of the deceased, Naama Hadany;

Levana Hadany;

Ayelet Hadany, a minor, suing by and through her guardian and next friend, Joseph Hadany;

Simacha Gal-On, individually and in his capacity as father, on behalf of the deceased, Liat Gal-On;

Shoshana Gal-On;

Idan Gal-On, a minor, suing by and through his guardian and next friend, Simacha Gal-On;

Lily Glottman, individually and in her capacity as wife, on behalf of the deceased, Simon Glottman;

Anat Glottman, a minor, suing by and through her guardian and next friend, Lily Glottman;

Ilan Glottman, a minor, suing by and through his guardian and next friend, Lily Glottman;

Carmela Rosner, individually and in her capacity as wife, on behalf of the deceased, Tuvia Rosner;

Mordechai Shefer;

Tova Aharonovits, individually and in her capacity as mother, on behalf of the deceased, Revital Aharonovits;

Gideon Haas;

Miriam Haas;

Michelle Haas, a minor, suing by and through her guardian and next friend, Gideon Haas;

Shlomo Zait, in his capacity as father, on behalf of the deceased, Mordechai Zait;

Ruth Drory, individually and in her capacity as wife, on behalf of the deceased, Amnon Drory;

Michael Drory, a minor, suing by and through his guardian and next friend, Ruth Drory;

Ayelet Drory, a minor, suing by and through her guardian and next friend, Ruth Drory;

Albert Ashkenazi, individually and in his capacity as husband, on behalf of the deceased, Mathilda Ashkenazi;

Yechiel Leibovici, individually and in his capacity as husband, on behalf of the deceased, Malca Leibovici;

Manashe Malca;

Eve Malca;

Abraham Shamir;

Iris Shamir, a minor, suing by and through her guardian and next friend, Abraham Shamir;

Ayelet Shamir, a minor, suing by and through her guardian and next friend, Abraham Shamir;

Esther Menashrov, in her capacity as wife, on behalf of the deceased, Utri Menashrov;

Jacob Besterman, in his capacity as father, on behalf of the deceased, Judah Besterman;

Simon Segev, in his capacity as father, on behalf of the deceased, Jacob Segev;

Judith Eshet, in her capacity as wife, on behalf of the deceased, Zvi Eshet;

Isaac Vachs;

Nessa Schwarz;

Joseph Savechnik;

Ella Savechnik;

Abraham Perets;

Shlomo Zait;

Judith Zait;

Gabriel Zait, a minor, suing by and through his guardian and next friend, Shlomo Zait;

Yfaat Zait, a minor, suing by and through her guardian and next friend, Shlomo Zait;

Alexander Jaacobi;

Ella Jaacobi;

Oded Jaacobi, a minor, suing by and through his guardian and next friend, Tirtza Jaacobi;

Usy Aviasaf;

Bruria Aviasaf;

Michelle Aviasaf, a minor, suing by and through her guardian and next friend, Uzy Aviasaf;

Esther Aviasaf, a minor, suing by and through her guardian and next friend, Uzy Aviasaf;

Bilhah Sela;

Alegra Cohen, in her capacity as mother and mother-in-law, on behalf of the deceased, Ziona Luzia and Abraham Luzia;

Jacob Polak, individually and in his capacity as father, on behalf of the deceased Shlomo Polak.

All of the above-listed persons appeared as plaintiffs and, on appeal, seek reversal of the June 30, 1981 Memorandum Opinion and Order of the District Court which dismissed their Complaints.

The following parties appeared as defendants before the District Court and except as noted below will seek affirmance of the District Court's decision of June 30, 1981.

National Association of
Arab Americans;

Palestine Congress of
North America;

Palestine Information Office.

The following parties were named as defendants but did not enter a formal appearance:

Libyan Arab Republic;

Palestine Liberation Organization.

Counsel understands that Hanoch Tel-Oren, *et al.*, are not pursuing this appeal against the Palestine Congress of North America, one of the defendants in the District Court.

The National Association of Arab Americans, Inc. has one subsidiary, the Middle East Policy and Research Corporation. The National Association of Arab Americans also has numerous chapters throughout the United States which are not separately listed herein.

These representations are made in order that Judges of this Court, *inter alia,* may evaluate possible disqualifications or recusal.

Cherif Sedky
Attorney of Record for the
National Association of Arab
Americans, Inc.

TABLE OF CONTENTS

	Page
Introduction	1
Statement Required by Rule 8(b) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit	2
Statement of the Case	2
Summary of Argument	10
Argument	13
I. The District Court Was Correct In Holding that the Alien Tort Statute, 28 U.S.C. § 1350, Does not Afford Subject Matter Jurisdiction over Plaintiffs' Tort Claims Against the NAAA	13
A. Plaintiff Failed to Allege Tortious Conduct by the NAAA	13
1. Plaintiffs' Conspiracy Allegations Are Insubstantial	15
2. The NAAA May Not Be Held Liable for Professor Sharabi's Statements and Associations	21
B. Plaintiffs Failed to Demonstrate that the NAAA Committed any Act in Violation of the Law of Nations or Treaties of the United States	25
II. The District Court was Correct in Ruling that 28 U.S.C. § 1331 Provides No Jurisdiction for Plaintiffs' Claims Against the NAAA	30
III. The District Court was Correct in Ruling that Plaintiffs' Claims are Barred by the Statute of Limitations	38
Conclusion	45

TABLE OF CITATIONS

Page

CASES

Aktiebolaget Bofors v. United States, 90 App. D.C. 92, 194 F.2d 145 (1951) 41

Berman v. Richford Industries, Inc., 26 F.R. Serv. 2d 10 (S.D.N.Y. 1978) 20

Black & Yates v. Mahogany Ass'n, 129 F.2d 227 (3d Cir. 1941), *cert. denied,* 317 U.S. 672 (1942) 16

Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971) 18

Blitz v. Boog, 328 F.2d 596 (2d Cir.), *cert. denied,* 379 U.S. 855 (1964) 41

**Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975) 20

**Brandenburg v. Ohio,* 395 U.S. 444 (1969) 22

Burns v. Spiller, 4 F.R.D. 299 (D.D.C. 1945), *aff'd,* 82 App. D.C. 91, 161 F.2d 377, *cert. denied,* 332 U.S. 792 (1947) 15

Chapalain Compagnie v. Standard Oil Co. (Indiana), 467 F. Supp. 181 (N.D. Ill. 1978) 32, 35

City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980) 20

Connor v. Real Title Corp., 165 F.2d 291 (4th Cir. 1947) 16

Cort v. Ash, 422 U.S. 66 (1975) 36

**Denny v. Barber,* 73 F.R.D. 6 (S.D.N.Y. 1977), *aff'd,* 576 F.2d 465 (2d Cir. 1978) 19

**Diggs v. Richardson,* 180 App. D.C. 376, 555 F.2d 848 (1976) 27, 34, 35-36

Dreyfus v. von Finck, 534 F.2d 24 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976) 28, 34-35

Page

Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.Is. 1973) 21

Erie R.R. v. Thompkins, 304 U.S. 64 (1938) 38

Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) 19

**Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) 25-26, 27, 28, 41

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) 20

Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961) 21

**Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969) 16, 17

Gully v. First National Bank, 299 U.S. 109 (1936) 32

**Healy v. James*, 408 U.S. 169 (1972) 23

Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972) 16

Hendry v. United States, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd* 418 F.2d 774 (2d Cir. 1969) 41

Hess v. Petrillo, 259 F.2d 735 (7th Cir. 1958) 18

Hodge v. Southern Ry., 415 A.2d 543 (D.C. 1980) 38

**IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) 27, 28, 44

Incomco v. Southern Bell Telephone and Telegraph Co., 558 F.2d 751 (5th Cir. 1977) 21

**Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486 (2d Cir. 1968) 31, 32

Jacobs v. Tenney, 316 F. Supp. 151 (D. Del. 1970) 16

Johnson v. United States, 178 App. D.C. 391, 547 F.2d 688 (1976) 41

Kaplan v. Manhattan Life Ins. Co., 71 App. D.C. 250, 109 F.2d 463 (1939) 38

Page

Lee v. Flintkote Co., 193 App. D.C. 195, 593 F.2d 1275 (1979) 38

Lopes v. Reederei Richard Shroder, 225 F. Supp. 292 (E.D. Pa. 1963) 28

McFarland v. Memorex Corp., 493 F. Supp. 631 (N.D. Cal. 1980) 20

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) 34

May Department Stores Co., Inc. v. Devercelli, 314 A.2d 767 (D.C. 1973) 38

Nalle v. Oyster, 230 U.S. 165 (1913) 15

North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978) 32

Noto v. United States, 367 U.S. 290 (1961) 23

Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977) 16

Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964) 16

Prescription Plan Service Corp. v. Franco, 552 F.2d 493 (2d Cir. 1977) 31

Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) 23

Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952) 36

Steorts v. American Airlines, Inc., 647 F.2d 194 (D.C. Cir. 1981) 38, 39

The Paquete Habana, 175 U.S. 677 (1900) 28

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 36

**United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) 35, 38

**Universal Airline v. Eastern Air Lines*, 88 App. D.C. 219, 188 F.2d 993 (1951) 41-42

Yates v. United States, 354 U.S. 298 (1957) 23

STATUTES AND RULES

Page

D.C. Code § 12-301 (1981) 38, 44

*D.C. Code § 12-301(4) (1981) 12-13, 39-42, 44

D.C. Code § 12-301(8) (1981) 39

Fed. R. Civ. P. 11 21

28 U.S.C. § 1330 (1976) 2

*28 U.S.C. § 1331 (1976) 12, 26, 30, 31, 33, 34, 38

28 U.S.C. § 1332 (1976) 2

*28 U.S.C. § 1350 (1976) 10-12, 13-15, 17, 22, 25-30, 41, 43, 44

28 U.S.C. § 1602-11 (1976) 2

INTERNATIONAL MATERIALS

Department of State, Treaties Affairs Staff Office of the Legal Advisor, *Treaties In Force* (Publication 9136) (1980) 33-34

Geneva Convention Relative to the Protection of Civilian Persons in Time of War 37

U.N. General Assembly Resolution 2787, December 6, 1971 ..... 24-25, 29

U.N. General Assembly Resolution 2792, December 6, 1971 29

U.N. General Assembly Resolution 2851, December 20, 1971 29

MISCELLANEOUS MATERIALS

16 Am. Jur. 2d *Conspiracy* § 49 (1979) 15

**Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena Irala*, 22 Harv. Int'l L.J. 53 (1981) 28

Page

2A Moore's Federal Practice §8.17[5], at 8-181 (2d ed. 1981) 16

Prosser, *Handbook of the Law of Torts*, § 47, at 293 (4th ed. 1971) 15

*Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1870 and 81-1871

HANOCH TEL-OREN, *et al.*,

Appellants,

v.

LIBYAN ARAB REPUBLIC, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF OF APPELLEE NATIONAL ASSOCIATION OF ARAB AMERICANS, INC.

Introduction

Hanoch Tel-Oren, *et al.*, ("Plaintiffs") have appealed the District Court's June 30, 1981 Memorandum Opinion and Order dismissing the Complaints against all defend-

ants, including the National Association of Arab Americans, Inc. ("NAAA"). The District Court dismissed the Complaints on two independent grounds: lack of subject matter jurisdiction and expiration of the applicable statute of limitations. J.A. Vol. II, at 123a-135a. Plaintiffs have appealed both cases for dismissal, although they have now abandoned certain alleged jurisdictional bases and certain alleged causes of action.[1]

Statement Required by Rule 8(b) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit

Counsel for the NAAA believe that the pending case has not previously been before this Court, or any other court, under the same or similar title. Counsel is unaware of any other related cases, either presently pending in this Court or in any other court, or that may be presented to this Court or to any other court in the future.

Statement of the Case

Insofar as the NAAA is concerned, Plaintiffs' "Statement of the Case" and "Statement of Facts"[2] omit perti-

---

[1] Before the District Court, Plaintiffs alleged subject matter jurisdiction to litigate claims against the NAAA pursuant to 28 U.S.C. § 1332 (diversity) and 28 U.S.C. §§ 1330, 1602-11 (Foreign Sovereign Immunities Act). J.A. Vol. I, at 7a. Plaintiffs also alleged in Count IV of the Complaint that they had causes of action resulting from alleged violations of certain criminal statutes. J.A. Vol. I, at 29a-32a. The District Court denied these claims. J.A. Vol. II, at 123a-124a, 132a. Plaintiffs have not contested these rulings on appeal.

[2] Pages 8-17 of Plaintiffs' Brief in this Court, dated November 16, 1981 (hereinafter cited as "Plaintiffs' Brief").

nent factual data which were important to the District Court's decision. Accordingly, the NAAA presents the following Statement of the Case concerning the NAAA's alleged responsibility for the injuries Plaintiffs suffered.

These consolidated cases[3] involve Plaintiffs' claims for damages for intentional torts allegedly committed during a violent attack on a bus near Tel Aviv, Israel, on March 11, 1978. Plaintiffs allege that the attack was carried out by 13 members of the El Fatah faction of the Palestine Liberation Organization ("PLO"), who were acting at the direction of the PLO. J.A. Vol. I, at 15a-18a.[4] There is no allegation of any direct NAAA involvement in the bus attack.

Notwithstanding the lack of any allegation that NAAA participated in the March 11 attack, Plaintiffs allege that the NAAA is nevertheless legally responsible for the injuries they suffered. The basis for such liability is alleged in the Complaint as follows:

> The NAAA, together with the other defendants, *planned* this terrorists operation and the tortious and criminal acts committed against the plaintiffs; *conspired to commit* this terrorist operation and the tortious and criminal acts committed against the plaintiffs; *raised funds* to support this terrorist operation and the tortious and criminal acts committed against

---

[3] In the District Court Plaintiffs brought two actions, one on behalf of persons injured in the March 11, 1978 incident and one on behalf of those killed in the incident. This Court on August 27, 1981, consolidated the cases for consideration on appeal.

[4] Plaintiffs have alleged on appeal that the bus incident was part of a "PLO and Libyan plot to terrorize the civilian population of Israel." Plaintiffs' Brief, p. 17.

> the plaintiffs; *procured arms, boats, hand grenades and other equipment* for this terrorist operation and the tortious and criminal acts committed against the plaintiffs; and otherwise *directed, participated in and acted in furtherance* of this terrorist operation and the tortious and criminal acts committed against the plaintiffs.

J.A. Vol. I, at 20a (emphasis supplied). These allegations were virtually word-for-word identical to the allegations made against two other defendants, the Palestine Information Office and the Palestine Congress of North America.[5] The NAAA answered and denied any involvement in the March 11 incident. J.A. Vol. I, at 86a. Indeed, the NAAA pointed out in its Motion to Dismiss the Complaints that it had condemned the March 11 incident, as well as Israel's retaliatory invasion of South Lebanon, in a press statement issued only 4 days after the bus attack. J.A. Vol. I, at 121a, 155a, 163a.

In their Complaints filed in the District Court, Plaintiffs provided absolutely no factual basis for naming the NAAA as a defendant. Rather, only conclusory allegations such as funding and procuring arms were made. Accordingly, the NAAA, in its Motion to Dismiss the Complaints, challenged Plaintiffs to demonstrate at least *some* factual basis for naming the NAAA as a defendant. J.A. Vol. I, at 121a, 122a, 144a.[6] The NAAA did not request

---

[5] J.A. Vol. I, at 20a-21a. These two defendants did not even exist at the time of the March 11, 1978 bus incident, making Plaintiffs' allegations against them patently absurd. *See* J.A. Vol. I, at 121a. Such defects in Plaintiffs' pleading support the NAAA's belief that Plaintiffs lack any factual basis for their allegations against the NAAA.

[6] The NAAA suspected that there was no factual basis whatsoever for naming the NAAA in the Complaints and that the Plaintiffs' true motivation was to hamper the NAAA in its representation of Arab Americans.

Plaintiffs to lay out their entire case prior to an opportunity to pursue discovery. Rather, the NAAA stated as follows:

> We recognize that plaintiffs cannot be expected to present their entire case at this time. However, the NAAA contends that there is simply no basis whatsoever for the naming of the NAAA as a defendant in these actions, as documented in Mr. Baroody's Affidavit. The NAAA and this Court, therefore, are entitled to a demonstration *now* that plaintiffs *do* have a tangible basis for having named the NAAA as a defendant.

J.A. Vol. I, at 144a.

The NAAA had good reason to be shocked at being named as a defendant in these actions and to demand a factual demonstration of the bases, if any, for Plaintiffs' action. The NAAA is a well-known and widely respected organization whose members are American citizens of Arab descent. Its primary purpose is to represent the two million American citizens of Arab ancestry in matters relating to the United States' national and international interests and to fight institutionalized prejudice against Arab Americans. The NAAA has been warmly received by the American government. Indeed, it has received messages of appreciation and well-wishes from Presidents Ford and Carter every year since 1975. J.A. Vol. I, at 154a-162a. For example, on April 12, 1976, President Ford wrote:

> Your organization has done much to enhance understanding and goodwill between the people of the U.S. and our friends in Arab nations. Such efforts help us greatly in attaining the final peaceful settlement in the Middle East to which our Government remains committed. *I commend you in fostering ties that are*

> *essential to our common goal of peace,* as a natural adjunct to our governmental efforts to forge mutually beneficial political and economic ties in that region.

J.A. Vol. I, at 158a (emphasis supplied). Two years later, President Carter wrote on March 8, 1978, just three days before the bus incident:

> I have great respect for your organization's important role in representing the values and political views of the large body of American citizens who share a common Arab heritage. Your leaders have met on numerous occasions with members of my staff, and I have had the opportunity to meet with your President, Joseph Baroody, and others at the White House. *I commend your responsible efforts to ensure that the views of Arab Americans are widely heard and properly understood.*

J.A. Vol. I, at 160a (emphasis supplied).

On April 30, 1981, Plaintiffs responded to the NAAA's Motion to Dismiss. *See* J.A. Vol. II, at 1a, *et seq.* Plaintiffs' ressponse confirmed the NAAA's conviction that Plaintiffs had *no* factual basis whatsoever to name the NAAA as a defendant. Indeed, while Plaintiffs had alleged that the NAAA had "planned," "conspired to commit," "raised funds," "procured arms, boats, hand grenades and other equipment," and "otherwise directed, participated in and acted in furtherance of" the March 11 bus incident (J.A. Vol. I, at 20a), *in fact* Plaintiffs had:

— No evidence whatsoever that the NAAA planned the March 11 incident. Plaintiffs alleged instead that it was the PLO and Libya, *not the NAAA,* which planned the March 11 incident and mission. J.A. Vol. II, at 12a; Plaintiffs' Brief, p. 10.

— No evidence whatsoever that the NAAA had conspired to commit the incident. Plaintiffs alleged instead that the PLO and Libya, *not the NAAA,*

formulated the mission resulting in the March 11 attack. Plaintiffs' Brief, p. 10. Indeed, Plaintiffs described no act or incident involving the NAAA which could even remotely connect the NAAA to any acts in connection with the bus incident.

— No evidence whatsoever that the NAAA had raised funds to support this incident. Plaintiffs alleged instead that it was the PLO, *not the NAAA*, which had raised funds for the operation. J.A. Vol. II, at 14a-15a.

— No evidence whatsoever that the NAAA had procured arms, boats, hand grenades and other equipment for this incident or any other incident. Plaintiffs alleged instead that it was Libya and the PLO, *not the NAAA*, which procured the necessary weapons. J.A. Vol. II, at 14a.

— No evidence whatsoever that the NAAA had otherwise directed, participated in or acted in furtherance of the incident.[7]

Instead of producing any factual support for the allegations in the Complaint, Plaintiffs disclosed on April 30, 1981 that their "case" against the NAAA rested, in fact, on three alleged "facts" concerning Hisham Sharabi, a professor at Georgetown University and a past president of the NAAA. These "facts"—the sole basis for naming the NAAA as a defendant—are alleged to be as follows:

---

[7] In view of the complete lack of a factual record to support their baseless allegations, it is astonishing that Plaintiffs before this Court of Appeals persist in alleging that "the NAAA funded, assisted in the funding, assisted the obtaining of arms, ratified, encouraged, apologized for and otherwise acted in furtherance of the PLO and Libyan plot to terrorize the civilian populations of Israel." Plaintiffs' Brief, p. 17. There is *no factual support* in the record for such statements.

(1) The *Washington Post* on August 2, 1978——4½ *months after the attack*—reported that Professor Sharabi did not condemn *per se* the use of violence by the PLO in its struggle to regain a homeland for the Palestinian people and that the March 11, 1978 incident showed that the Palestinians are willing " 'to hurl their bodies against the monster.' " J.A. Vol. II, at 11a.[8]

(2) Professor Sharabi is purported to have stated in an introduction to a book, *published in 1973,* describing the Palestinian resistance movement subsequent to the Israeli occupation of Palestine, that "the organized violence of the oppressed Palestinians" and their "armed struggle" had enabled the Palestinian resistance movement for self-determination to "organiz[e] the people for carrying out political struggle." Professor Sharabi is alleged

---

[8] The NAAA provided the District Court with the full *Washington Post* article. Supp. J.A. at 15a-16a. The article does not link Professor Sharabi or the NAAA to the March 11 incident in any way. Indeed, Professor Sharabi made clear that he favors a negotiated settlement of the Palestine question.

> A settlement [must be] based on full rights of Palestinians, particularly self-determination and complete withdrawal of Israel from occupied areas and total sovereignty for Palestinians. Anything short of that is inadequate. It must include the Gaza Strip and West Bank and East Jerusalem . . . .

Supp. J.A. at 16a. Moreover, with respect to the bus incident itself, Professor Sharabi expressed his dismay at the incident, calling it "politically unfortunate, humanly unfortunate," while likening it to tactics utilized by Israeli Prime Minister Begin at the time he headed the "terrorist group" known as the Irgun when Israel was first created in 1948. Supp. J.A. at 16a.

to have made similar statements in a *1972 publication.* J.A. Vol. II, at 15a-16a.[9]

(3) Plaintiffs alleged that Professor Sharabi "was and remains a close personal friend of Yasar [sic] Arafat, leader of the PLO, and was and remains in close consultatation with Arafat. Sharabi has actually been named as a possible member of a PLO government in exile." J.A. Vol. II, at 12a.[10]

---

[9] Plaintiffs' attempts to link Professor Sharabi's alleged publications 5-6 years earlier to terrorist activities in 1978 is ludicrous. The first of the publications did not even contain Professor Sharabi's views at *all.* See J.A. Vol. II, at 108a; Supp. J.A. at 17a-40a. The second publication, *Shu'on Falastiniyeh* (Palestinian Affairs), makes clear Professor Sharabi's view that Palestinian resistance, and indeed violent struggle, is directed at a governmental structure—Zionism—with which the Palestinians (and other Arab countries) are still at war—and have been since 1948. J.A. Vol. II, at 108a-109a; Supp. J.A. at 41a-58a (complete Sharabi article). Far from seeking the genocide of the Israeli people as suggested by Plaintiffs, the Palestinian armed struggle of which Professor Sharabi wrote *in 1972,* sought to establish a secular democratic state within which Jews and Palestinians (Christian and Muslim) could live in harmony:

> The [Palestinian] organizations all share the conviction that liberation must in the end be *based on Palestinian-Jewish accord* outside the framework of Zionism. But the task of breaking the Zionist superstructure cannot be carried out by the Palestinians alone, in their capacity as an outside source. To succeed, this project must also become a Jewish undertaking. . . .

J.A. Vol. II, at 109a; Supp. J.A. at 51a (emphasis supplied).

[10] Plaintiffs' attempt to impose liability on the NAAA because of an alleged association by Professor Sharabi with Yassir Arafat or the PLO is completely baseless. This, as well as Plaintiffs' arguments concerning Professor Sharabi's alleged

(Continued on next page)

In short, the undisputed factual background presented to the District Court was clear: (1) there was no link between the NAAA and the March 11, 1978 bus incident; (2) Plaintiffs' subsequent pleadings before the District Court made clear that they had no basis whatsoever to support any of the allegations made against the NAAA in the Complaint; and (3) the sole basis for naming the NAAA as a defendant were the alleged statements and associations of Professor Sharabi, statements and associations which Plaintiffs assume have some sort of significance in the case and which Plaintiffs further assume may be attributed to the NAAA. On the foregoing record, the District Court found that the NAAA had "not been connected to the claimed torts sufficiently to permit the action to proceed against [it]." J.A. Vol. II, at 130a.

Summary of Argument

The District Court ruled correctly that 28 U.S.C. § 1350 does not provide subject matter jurisdiction over

---

(Continued from previous page)

statements condoning violence, raise profound constitutional issues, as discussed later in this brief. Further, as reported by *The Wall Street Journal* in an article entitled "Not Just Guerrillas," the PLO is, in effect, a government-in-exile for the world's 3.5 million to four million Palestinians. Supp. J.A. at 61a-62a. The PLO has "its own 'state department,' welfare agency, hospital chain [in 1979, consisting of 12 hospitals and 100 clinics], 'national' library, education department, think tank, press agency, radio network and tax-collection system." Supp. J.A. at 61a. As *The Wall Street Journal* recognizes, the PLO, and its many divisions and factions, have numerous legitimate and admirable goals and purposes. *Id.* Thus, "support" of the PLO or its "goals" or association with the PLO cannot, under any circumstances, be blithely assumed to imply support for particular terrorist acts that may be carried out in the name of one faction or another of the PLO.

Plaintiffs' claims against the NAAA. Under Section 1350, Plaintiffs must allege that the NAAA committed a tort against them and that the tort was in violation of a treaty or the law of nations. However, the undisputed facts, even as alleged by Plaintiffs, establish that the NAAA committed no tort, much less one that violates the law of nations or a treaty of the United States.

Plaintiffs cannot confer Section 1350 jurisdiction on the District Court by alleging conspiracy or by reliance on Professor Sharabi's alleged statements and his alleged "association" with Yassir Arafat. The District Court correctly ruled that Plaintiffs' conspiracy allegation was "insubstantial" and fell far short of the specificity required by applicable case law. Professor Sharabi's statements and associations also do not satisfy the Section 1350 requirement that Plaintiffs allege a tort was committed by the NAAA. Indeed, these statements and associations not only are not tortious but constitute the exercise of protected First Amendment rights.

The District Court also correctly ruled that Section 1350 must be narrowly construed. Section 1350 provides jurisdiction where the tort allegedly is committed by a person under guise of official authority. There is no evidence that the NAAA has ever acted pursuant to governmental authority; rather, the NAAA is a private party with no link to any governmental entity.

The District Court ruled correctly that Section 1350 provides subject matter jurisdiction only if Plaintiffs demonstrate that the treaty or law of nations which is relied upon is judicially enforceable. Any other interpretation of Section 1350 would give aliens practically auto-

matic access to the federal courts under circumstances where American citizens have no federal forum. The District Court properly interpreted Section 1350 narrowly so as to avoid such an unintended result.

Finally, Section 1350 does not provide jurisdiction because the March 11, 1978 incident did not violate the law of nations. That tragic event—which the NAAA itself has condemned—is part of the Palestinian/Israeli struggle which has persisted since 1947. As such, there is no broad international consensus that this and other similar incidents violate the law of nations. Since no consensus exists, Section 1350 jurisdiction also is lacking.

The District Court also ruled correctly that there is no "federal question" jurisdiction under 28 U.S.C. § 1331. Plaintiffs' claims do not arise under any federal statute, treaty, or the law of nations. Rather, these claims constitute common law intentional torts, which will not require any reference to federal law to adjudicate. Further, the laws and treaties referred to by Plaintiffs do not provide Plaintiffs with a private right of action. Since no judicially enforceable rights were created under the "laws" cited by Plaintiffs, Section 1331 jurisdiction is lacking.

The District Court ruled that Plaintiffs' claims also are barred by the one-year statute of limitations of D.C. Code § 12-301(4). This ruling should be affirmed. The D.C. Code specifies a one-year limitation period for intentional torts such as assault, battery and false imprisonment. These are the very torts which Plaintiffs have alleged in this case and, accordingly, the District Court properly ruled that they are time-barred.

Plaintiffs attempt to avoid the limitation period by calling certain of these alleged torts by names not specifically enumerated in D.C. Code § 12-301(4). However, the *substance* of Plaintiffs' claims is an allegation of violent intentional torts of the kind for which the Code specifies a one-year limitation period. The District Court was clearly correct in disregarding Plaintiffs' labels and instead basing its ruling on the substance of the claims.

Argument

I. The District Court Was Correct in Holding that the Alien Tort Statute, 28 U.S.C. § 1350, Does Not Afford Subject Matter Jurisdiction over Plaintiffs' Tort Claims Against the NAAA.

The District Court held that 28 U.S.C. § 1350 provides no subject matter jurisdiction over Plaintiffs' claims against the NAAA. The Court rested its decision on two bases: that no tort was alleged to have been committed by the NAAA; and that Plaintiffs failed to demonstrate a basis in the law of nations or any treaty of the United States for the torts alleged by Plaintiffs against the NAAA. The NAAA demonstrates below that the District Court was correct in finding no Section 1350 jurisdiction.

A. Plaintiffs Failed to Allege Tortious Conduct by the NAAA.

Section 1350 is specific in its jurisdictional grant to the district courts:

> The district courts shall have original jurisdiction of any civil action by an alien *for a tort only*, committed in violation of the law of nations, or a treaty of the United States. 28 U.S.C. § 1350 (1976) (emphasis supplied).

Thus, under Section 1350, a court must find that the plaintiff has alleged that each defendant has committed a tort against the plaintiff. With respect to the NAAA, the District Court found that the tortious allegations were "clearly insubstantial" and, accordingly, that the Plaintiffs had "not satisfied the requirement of § 1350 that a tort be stated in violation of the law of nations or a treaty of the United States . . . ." J.A. Vol. II, at 130a-131a.

The District Court's holding was clearly correct. As documented in the Statement of the Case, *supra,* Plaintiffs have no factual basis to assert that the NAAA had any involvement in the March 11 incident and present not even a shred of evidence that the NAAA otherwise supported that attack. In short, Plaintiffs do not allege any tortious acts whatsoever by the NAAA, much less tortious acts by the NAAA which allegedly violate the law of nations or a treaty of the United States. Accordingly, the Section 1350 jurisdictional bases were clearly not met by Plaintiffs and dismissal was proper.

Plaintiffs still persist in their attempt to hold the NAAA legally responsible for the March 11 incident, notwithstanding the NAAA's lack of connection to that event. In this effort, Plaintiffs rest their case on either of two improper grounds—that the NAAA is liable under an unarticulated conspiracy theory[11] or that the NAAA is liable because of the alleged statements and associations of Professor Sharabi. We deal with these in turn.

---

[11] Plaintiffs plead civil conspiracy in Count V of the Complaint J.A. Vol. I, at 32a-33a. Since Plaintiffs demonstrate no direct NAAA involvement in the March 11 incident, conspiracy is, in fact, the heart of their case.

1. *Plaintiffs' Conspiracy Allegations Are Insubstantial.*

There are several shortcomings in Plaintiffs' conspiracy theory. First, a conspiracy to commit an intentional tort does not, in fact, constitute a separate "tort."[12] Particularly where, as here, the defendant NAAA clearly never had any role in the conduct (*i.e.*, the attack) which comprised the tortious act, an allegation of conspiracy cannot meet the Section 1350 requirement that the defendant have committed a tort. Moreover, none of the acts alleged to have been performed by the NAAA—devising a plan, providing funds, procuring equipment—could themselves be said to constitute a tort. Since Section 1350 requires, *for jurisdictional purposes,* that *the NAAA* have committed a tort, and since none of the acts alleged to have been performed by the NAAA constitute a tort, there is no Section 1350 jurisdiction over the NAAA.

Second, the law is clear that "it is not enough merely to state that a conspiracy has taken place." 2A Moore's Federal Practice ¶ 8.17[5], at 8-181 (2d ed. 1981). Rather, facts to support the conspiracy allegation must also be pleaded. *Heart Disease Research Foundation v. General Motors Corp.,* 463 F.2d 98, 100 (2d Cir. 1972) ("a bare bones statement of conspiracy . . . without any supporting facts permits dismissal."); *Connor v. Real Title Corp.,* 165

---

[12] Civil conspiracy is not in itself an actionable tort. It is well established that "the gist of the civil action of conspiracy is the . . . tortious act complained of." *Burns v. Spiller,* 4 F.R.D. 299, 300 (D.D.C. 1945), *aff'd,* 161 F.2d 377 (D.C. Cir.), *cert. denied,* 332 U.S. 792 (1947). *See also Nalle v. Oyster,* 230 U.S. 165 (1913); 16 Am. Jur. 2d *Conspiracy* § 49 (1979); Prosser, *Handbook of the Law of Torts,* § 47, at 293 (4th ed. 1971).

F.2d 291, 294 (4th Cir. 1947) ("[The conspiracy] allegation is much too vague and general and must fall, since it is unsubstantiated by any facts disclosed in the pleadings."); *Black & Yates v. Mahogany Ass'n,* 129 F.2d 227 (3d Cir. 1941), *cert. denied,* 317 U.S. 672 (1942). *See also Ostrer v. Aronwald,* 567 F.2d 551 (2d Cir. 1977); *Powell v. Workmen's Compensation Board,* 327 F.2d 131 (2d Cir. 1964); *Jacobs v. Tenney,* 316 F. Supp. 151 (D. Del. 1970).

In *Granville v. Hunt,* 411 F.2d 9 (5th Cir. 1969), the Court of Appeals for the Fifth Circuit addressed the pleading requirements for a civil conspiracy. In *Granville,* the court dismissed for failure to state a claim, a complaint much like plaintiffs' herein, for "conspiracy" to deprive plaintiff of constitutional rights and to subject plaintiff to cruel and unusual punishment. The court explained its ruling, which is directly applicable here, as follows:

> *The appellant has failed to allege any facts showing either the existence or the execution of the claimed conspiracy.* The pleadings contain only *bare allegations* that the defendants conspired against the appellant and that as a result of this conspiracy, he was subjected to cruel and unusual punishment. These allegations contain mere bare bones and are totally without any fleshing to show a link between the alleged conspirators. They also fail 'to allege any overt acts related to the promotion of the claimed conspiracy' . . . . In short, [*s*]*uch pleading is clearly insufficient.* 'Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in suppport of the claim. General allegations of this kind unsupported by any factual statements have generally been rejected as insufficient.' . . . '[T]he complaint must do more than merely state vague and conclusionary allegations respecting the existence [and operation] of a conspiracy.'

Id. at 11 (citations omitted, emphasis added, and bracketed language in original).

Under the foregoing precedents, Plaintiffs' conspiracy allegations against the NAAA clearly constitutes no more than bare allegations and "are completely without factual underpinnings." *Id.* Since Plaintiffs' entire case rested on its conspiracy allegation and since that allegation was clearly insufficient, the District Court was correct in holding that Section 1350 jurisdiction was lacking. *See* J.A. Vol. II, at 130a-131a. Thus, the District Court found:

> As to . . . the NAAA . . . plaintiffs' allegations of tortious conduct and conspiracy are clearly insubstantial . . . [T]here are no specific allegations whatsoever to support a claim of conspiracy.
>
> * * *
>
> These . . . defendants have not been connected to the claimed torts sufficiently to permit the action to proceed against them. Various courts have considered complaints *such as the instant one* and held that vague, conclusory allegations of conspiracy are insufficient to predicate an action for damages.

J.A. Vol. II, at 130a (captions added, citations omitted).

Plaintiffs assert, nevertheless, that the allegations of "fact" set out in the Complaint and in their Memorandum in Opposition to Defendant's Motion to Dismiss (J.A. Vol. II, at 1a), had to be accepted by the District Court as true. Specifically, Plaintiffs state:

> In opposing a motion to dismiss the complaint for lack of subject matter jurisdiction under § 1331 or 1350, the plaintiffs do not have a duty and are under no obligation to substantiate the allegations in the

complaint, particularly when the discovery process has not yet even begun.

J.A. Vol. II, at 17a-181a.

Plaintiffs have missed the point. While they are indeed not obligated to substantiate the allegations of their complaint in order to defeat a motion to dismiss, they *are* required to state the facts upon which their claim is based. Mere conclusory allegations are not enough, and are not taken as true by a court in considering a motion to dismiss. *Hess v. Petrillo,* 259 F.2d 735, 736 (7th Cir. 1958) ("Mere unsupported conclusions of fact or mixed fact and law are not admitted by a motion to dismiss."); *Blackburn v. Fisk University,* 443 F.2d 121, 123 (6th Cir. 1971) ("... we are not bound by allegations that are clearly unsupported and unsupportable ....").

In the instant action, Plaintiffs "factual" allegations are completely conclusory. They state merely that the NAAA "planned," "funded" and "directed" the March 11 attack, without stating any specific facts upon which these conclusions rest. Indeed, Plaintiffs seem to have pulled these conclusions out of thin air, as they provided no details whatsoever in support thereof when challenged to provide a basis for naming the NAAA as a defendant.[13]

Nor are Plaintiffs entitled to discovery in order to lend substance to their conclusory allegations, as they suggest in their brief. *See* Plaintiffs' Brief, p. 33. As stated

---

[13] As noted in the Statement of the Case, Plaintiffs' response to the NAAA's Motion to Dismiss made clear that each of the allegations concerning "funding," "directing" and "planning" the bus incident were directed at the PLO and/or Libya—not to the NAAA.

by the Second Circuit in a somewhat different context, a complaint must stand or fall on its merits and cannot be used as a vehicle for searching out and discovering a right of action. *Fifth Avenue Peace Parade Comm. v. Gray,* 480 F.2d 326, 333 (2d Cir. 1973), *cert. denied,* 415 U.S. 948 (1974). If Plaintiffs have failed to state a claim, they may not use the liberal federal rules of discovery to find one.

This principle is perhaps best stated by Judge Lasker in *Denny v. Barber,* 73 F.R.D. 6 (S.D.N.Y. 1977), *aff'd,* 576 F.2d 465 (2d Cir. 1978). In *Denny,* which involved defendants' motion to dismiss plaintiff's complaint for purported violations of the federal securities laws, the court noted both the "majestic breadth" of the complaint and its complete lack of detail, and granted the motion. *Id.* at 8. Commenting on the effects of allowing such a complaint to go forward, Judge Lasker declared:

> *Complaints should not be conceived merely as tokens, guaranteeing access to a world of discovery.* . . . 'A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one.' *Neither plaintiff nor his counsel are entitled to roam through a defendant's files at the mere drop of a 'complaint.'*

73 F.R.D. at 10 (emphasis added; citation omitted). *See also McFarland v. Memorex Corp.,* 493 F. Supp. 631, 636-37 (N.D. Cal. 1980); *Berman v. Richford Industries, Inc.,* 26 F.R. Serv. 2d 10, 15-16 (S.D.N.Y. 1978); *City of Gainesville v. Florida Power & Light Co.,* 488 F. Supp. 1258, 1266-67 (S.D. Fla. 1980). Plaintiffs here should not be allowed, on the basis of the token allegations in their Complaint, to roam through the NAAA's files trying to justify this action.

The Supreme Court of the United States has recognized the dangers and unacceptable costs of permitting plaintiffs with groundless claims to go forward with discovery. In *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975), the Court discussed the possibilities for discovery abuse in Rule 10b-5 cases:

> To the extent that this [discovery] process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of [the Federal Rules of Civil Procedure] . . . and of the many cases liberally interpreting them. *But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.*

Id. at 741 (emphasis added). *See also Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977).

Plaintiffs' conspiracy "claim" against the NAAA is groundless.[14] Despite every opportunity to do so, Plaintiffs have failed to alleged a single fact from which it may

---

[14] Rule 11 of the Federal Rules of Civil Procedure provides that groundless complaints may be stricken. Although the NAAA did not move under Rule 11 below, it appears now that such a motion would have been equally appropriate. The courts have not hesitated to strike pleadings where it is obvious that they were filed without sufficient grounds. *See, e.g., Incomco v. Southern Bell Telephone and Telegraph Co.,* 558 F.2d 751 (5th Cir. 1977); *Econo-Car International, Inc. v. Antilles Car Rentals, Inc.,* 61 F.R.D. 8 (D.V. Is. 1973); *Freeman v. Kirby,* 27 F.R.D. 395 (S.D.N.Y. 1961).

be inferred that the NAAA participated in this alleged conspiracy. Plaintiffs' conclusory conspiracy allegations do not withstand scrutiny under the Federal Rules or case law, and Plaintiffs are not entitled to discovery in order to find a claim for themselves.

2. *The NAAA May Not be Held Liable for Professor Sharabi's Statements and Associations.*

Since Plaintiffs' "conspiracy" theory is clearly deficient, they must rest their case against the NAAA on Professor Sharabi's alleged statements and associations. However, as demonstrated in the Statement of the Case, the Sharabi statements and associations cannot possibly support imposition of liability.

Assuming *arguendo* nevertheless that Plaintiffs' version of those statements and associations is accurate and relevant and assuming further that Professor Sharabi's statements and associations are properly considered to be made by the NAAA,[15] Plaintiffs still would not have alleged that the NAAA had committed any tort as required by Section 1350. Rather, the Sharabi statements and his alleged associations represent the exercise of protected First Amendment rights and thus cannot form the basis for a tort action.

It is important to keep Professor Sharabi's alleged statements and associations in perspective. First, he allegedly expressed sympathy for the Palestinian cause and for the use of violent means to rectify perceived wrongs. These statements were made 6 years *before* and 4½ months

---

[15] There is no evidence that Professor Sharabi was acting on behalf of the NAAA when he made the alleged statements or supposedly "associated" with Mr. Arafat.

after the bus attack. Second, Professor Sharabi also allegedly associated with Yassir Arafat, who allegedly advocates violent acts against Israel, although even Plaintiffs have not suggested that Professor Sharabi actively (or even passively) was involved in or urged the March 11, 1978 incident.

Such expression of views and such associations cannot possibly constitute a "tort" as required by Section 1350. It is an axiomatic principle of Constitutional law that a mere expression of personal belief cannot serve as a basis for finding the NAAA liable for the tortious conduct of others. This particularly is the case when Professor Sharabi's alleged tortious statements were made either 6 years before or 4½ months after the bus incident which is the subject of Plaintiffs' case. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Noto v. United States,* 367 U.S. 290 (1961); *Yates v. United States,* 354 U.S. 298, 321 (1957) (" . . . advocacy [of the doctrinal justification of forcible overthrow, with the intent to accomplish such overthrow], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action. . . ."). Further, Professor Sharabi's statements were made in a newspaper interview and in a scholarly journal. As such, they do not even remotely approach the kind of incitement for which the NAAA might conceivably be held liable.

Similarly, Plaintiffs' suggestion that tort liability can be based solely upon the political or social views of persons with whom one associates is equally repugnant to basic First Amendment principles. Thus, the fact that Professor Sharabi allegedly associates with the PLO establishes no possible basis for civil liability and cannot possibly constitute a "tort" as required under Section 1350. *See Healy v. James,* 408 U.S. 169, 185-86 (1972) (" . . . it has been established that 'guilt by association alone . . .' is an impermissible basis upon which to deny First Amendment rights," and ". . . the Court has consistently disapproved . . . denying rights and privileges solely because of a citizen's association with an unpopular organization."); *Sawyer v. Sandstrom,* 615 F.2d 311, 317 (5th Cir. 1980) ("knowing association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct"). Accordingly, this Court should reject Plaintiffs' blatant attempt to bootstrap their baseless charges against the NAAA. Even if the NAAA did share the general objectives of the PLO, that clearly affords no basis for NAAA responsibility for particular tortious acts alleged in the Complaint.[16]

---

[16] Under Plaintiffs' theory, American Irish Catholics who support the overall objective of the Irish Republican Army ("IRA")—that is, the establishment of a separate Catholic state in Northern Ireland—would be liable for all senseless acts of violence committed by IRA members. The argument would go as follows: (1) the IRA is known to commit senseless acts of terror; (2) any active support of the IRA or its objectives, or recognition that the Irish resistance movement is an armed or violent struggle, must be equated to the encouragement and support of IRA terrorist activities; (3) such encouragement of terrorist activities consti-

(Continued on next page)

In short, the fact that certain NAAA members, and the NAAA itself, may have spoken out in favor of Palestinian self-determination, is irrelevant to the liability issues of this case.[17] And even if NAAA members have spoken out in support of armed or violent resistance by the Palestinian people, such expressions cannot support Plaintiffs' allegations of liability against the NAAA for a particular act of terrorism. Section 1350 required Plaintiffs to allege *tortious conduct* by the NAAA before jurisdiction could be found. Plaintiffs did *not* allege such conduct. The District Court accordingly was correct in dismissing Plaintiffs' claims.

(Continued from previous page)

tutes a conspiracy to commit, or the "assistance" in the commission of, any specific terrorist act of the IRA (even if the American IRA supporter had nothing to do with that act). Thus, according to Plaintiffs, if you support the IRA or its objectives—or, for that matter, any political movement that has any connection with violent activities, whether conducted by the entire group, a faction of the group, or even a fanatic who claims association with the group—you had better not publicly express your support or you will face the prospect of billions of dollars in civil liability. Such a theory not only flies in the face of basic American Constitutional principles of free speech and association, but it could be applied to create civil liability for supporters of any movement that regularly, or even occasionally, is forced to resort to armed or violent struggle.

17 Moreover, the NAAA is not alone in taking this position. For example, the General Assembly of the United States, by more than a two-thirds majority, has recognized and affirmed not only "the inalienable rights of all peoples, and in particular . . . the Palestinian people, to freedom, equality and self-determination," but it has also recognized "the legitimacy of their struggles to restore those rights," and has affirmed "man's basic human right *to fight for the* self-determination of his people . . . ." General Assembly Resolution 2787 of December 6, 1971. Supp. J.A. at 12a.

B. Plaintiffs Failed to Demonstrate that the NAAA Committed any Act in Violation of the Law of Nations or Treaties of the United States

The District Court found no Section 1350 jurisdiction for an additional reason: Plaintiffs failed to demonstrate a cause of action under the law of nations or treaties of the United States which would cover the actions alleged to have been committed by the NAAA. J.A. Vol. II, at 131a-132a. Plaintiffs sharply contest the foregoing District Court holding, arguing primarily that it conflicts with the Second Circuit's decision in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980).

In *Filartiga,* the Second Circuit held that "deliberate torture perpetrated *under color of official authority* violates universally accepted norms of the international law of human rights, regardless of the nationalities of the parties." 630 F.2d at 878 (emphasis supplied). Indeed, the entire Second Circuit opinion emphasizes repeatedly that the law of nations was violated in that case because the defendant, under official authority of the Paraguayan government, had committed acts which virtually every nation had declared to be illegal when committed by a nation or by one acting on behalf of a nation.

The instant case insofar as the NAAA is involved is entirely different from *Filartiga.* Plaintiffs make no claim that the NAAA or any person acting on behalf of the NAAA was acting or purporting to act in an official capacity such that the law of nations or treaties would attempt to reach and proscribe that conduct. Rather, insofar as Plaintiffs' claims against the NAAA are concerned, Plaintiffs have only alleged conduct by a private party, the NAAA, and no guise of official conduct.

The District Court construed Section 1350 in a rational manner in finding no subject matter jurisdiction. The District Court ruled that Plaintiffs must not only allege a violation of a treaty or the law of nations but also must demonstrate that the provision of international law they rely upon provides a privately enforceable cause of action. Plaintiffs object to the District Court's interpretation of Section 1350, stating that an alien may bring an action in federal court for violation of international law even if that law is not judicially enforceable. Plaintiffs' Brief, pp. 25-29. The NAAA submits that Plaintiffs' interpretation leads to a result that cannot have been intended.

If an American citizen sues in federal court for violation of the law of nations or treaty, he must demonstrate under 28 U.S.C. § 1331 that the provision of international law which is relied upon is judicially enforceable. This is a heavy burden, since the general rule is that treaties are executory and not judicially enforceable absent implementing legislation. *See Diggs v. Richardson,* 555 F.2d 848, 850-51 (D.C. Cir. 1976). Under Plaintiffs' interpretation, however, Section 1350 permits *aliens* far greater access to federal courts than United States citizens. Indeed, aliens would be able to sue in federal court merely by alleging violation of an American treaty, regardless of whether that treaty provides any judicially enforceable rights. The District Court correctly rejected that result and provided the rational interpretation that international law must provide a judicially enforceable right before Section 1350 jurisdiction may be established. This is entirely consistent with the Section 1350 case law which emphasizes

that Section 1350 must be narrowly construed. *See, e.g., IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).[18]

Finally, under any interpretation of Section 1350, the NAAA submits that jurisdiction is lacking because this is *not* an instance where the law of nations or an American treaty has been violated.[19] The law of nations does not cover all possible tortious acts and it does not cover acts merely because they may be reprehensible, cruel or savage. Rather, the law of nations is violated only where there has been a violation "of those standards . . . affecting the relationship between states or between an individual and a foreign state" where those standards are used "by those states for their common good and/or in dealings *inter se*." *IIT v. Vencap*, 519 F.2d at 1015, *quoting Lopes v. Reederei Richard Shroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963); *see The Paquete Habana*, 175 U.S. 677 (1900) (general assent of nations must be present before principle of international law is judicially enforceable). Where no concensus of view is present as to the prevailing rule of law, the law of nations is not violated. *See Dreyfus v. von*

---

[18] The District Court interpreted Section 1350 in a manner which is arguably more restrictive than the Second Circuit's dicta in *Filartiga*. The NAAA submits that the District Court clearly reached the correct result, one which keeps Section 1350 within its intended bounds.

[19] The District Court declined to decide whether the torts alleged in the Complaint violate the law of nations. J.A. Vol. II, at 125a. Plaintiffs have argued at length, however, that the actions of other defendants did violate the law of nations and thus that the District Court had subject matter jurisdiction to consider those claims. By implication, Plaintiffs assert that jurisdiction must therefore be present to adjudicate the claims against the NAAA. *See* Plaintiffs' Brief, pp. 29-32.

Finck, 534 F.2d 24 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976). In short, the law of nations is violated only where there is a clear international consensus condemning the acts in question.

Indeed, the Second Circuit's decision in *Filartiga,* on which Plaintiffs principally rely, supports the proposition that only those acts which are condemned by a clear international consensus fall within the scope of Section 1350. Thus, in reviewing *Filartiga,* commentators have suggested that Section 1350 reaches only such torts as genocide, torture, slavery and summary execution—not intentional torts committed within the context of a bitter and violent political struggle. Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena Irala,* 22 Harv. Int'l. L.J. 53, 87-97 (1981).

Without belittling in any way the injuries Plaintiffs have suffered or condoning the violent acts alleged in the Complaint, the NAAA suggests that this case involves an area where *no* international consensus is present and where, therefore, the law of nations is not violated. To say the least, the disagreement over the Palestinian issue has sharply divided the world community. Israel has been condemned for its many "raids" into Lebanon, which have resulted in thousands of civilian casualties.[20] Many nations have called for creation of a Palestinian state and others

---

[20] The United Nations General Assembly, by vote of over two-thirds of the member nations, has recognized and deplored the fact that the rights of Palestinians have been violated by Israel, as evidenced by General Assembly Resolutions 2792 of December 6, 1971, and 2851 of December 20, 1971. Supp. J.A. at 3a-8a.

have even supported the use of violence to accomplish these ends. Indeed, the General Assembly of the United Nations, by more than a two-thirds majority, has recognized and affirmed not only "the inalienable rights of all peoples, and in particular . . . the Palestinian people, to freedom, equality and self-determination," but it has also recognized "the legitimacy of their struggles to restore those rights," and has affirmed "man's basic human right *to fight for the self-determination of his people. . . .*" General Assembly Resolution 2787, December 6, 1971. Supp. J.A. at 11a-12a (emphasis added).

The March 11 incident — which was condemned by the NAAA[21] — cannot be isolated from its context as part of the much larger Palestinian issue which has tragically embroiled Arabs and Jews alike since at least 1947. The NAAA submits that in a geopolitical arena as divided as the Middle East, there is no consensus regarding whether the acts committed on March 11, 1978 violate the law of nations. Indeed, Plaintiffs have conceded the essentially *political* nature of the March 11 incident.

> One of the primary purposes of the March 11 attack was to sabotage the foreign relations of the United States and its negotiations by destroying the positive efforts made in the Camp David accords. It was the intent of the PLO and Libya to conduct such a barbaric attack that would mandate a response by Israel against the Palestine guerrilla basis in southern Lebanon, thus setting off a chain of events which would create a climate making it impossible for any Arab government to negotiate with Israel or for that matter, with the United States.

---

21 J.A. Vol. I, at 155a, 163a.

Plaintiffs' Brief, p. 15. Section 1350 was *not* designed to provide jurisdiction to adjudicate claims caught up in such an international political and social dispute. Accordingly, since the international consensus which constitutes a prerequisite to Section 1350 jurisdiction is lacking, the District Court was correct in holding that Section 1350 jurisdiction is not present. Indeed, any different result would open the floodgates to a host of claimants seeking access to the Federal Courts to redress harm committed against them by groups whose ideologies span the entire political spectrum.

II. The District Court was Correct in Ruling that 28 U.S.C. § 1331 Provides no Jurisdiction for Plaintiffs' Claims Against the NAAA.

The District Court ruled that 28 U.S.C. § 1331 did not provide a basis for jurisdiction over Plaintiffs' claims against the NAAA. J.A. Vol. II, at 123a-129a. The Court ruled that none of the criminal statutes, treaties or alleged laws of nations cited by Plaintiffs provided an express or implied cause of action and, consequently, Plaintiffs "fail[ed] to state a cause of action arising under the Constitution, laws or treaties of the United States . . . ." J.A. Vol. II, at 129a. On appeal, Plaintiffs have merely restated arguments that the District Court carefully considered but rejected.[22]

This Court should also reject these arguments. To sustain Section 1331 jurisdiction, Plaintiffs must demonstrate that their claims "arise under" the laws or treaties

---

[22] Plaintiffs have abandoned on appeal their claim that selected federal criminal statutes (listed in Count IV of the Complaint) provide a cause of action for the torts alleged in the Complaint. *See* J.A. Vol. I, at 29a-32a.

of the United States. Plaintiffs have failed to demonstrate the requisite nexus to United States law or treaties. Accordingly, this Court should affirm the District Court holding of a lack of Section 1331 subject matter jurisdiction.

Claims do not "arise under" American laws or treaties merely by Plaintiffs' reference in the Complaint to laws or treaties of the United States. *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 492 (2d Cir. 1968); *see Prescription Plan Service Corp. v. Franco*, 552 F.2d 493, 495 (2d Cir. 1977). Rather, as the *Ivy* court stated:

> [T]hat federal law furnishes a necessary ingredient of a claim is insufficient as a basis for federal jurisdiction, *unless the claim presents an issue requiring construction of an Act of Congress or unless a distinctive policy of an Act of Congress requires that federal principles control the disposition of the claim.*

391 F.2d at 493 (emphasis supplied). Similarly, a "court must ascertain from the complaint whether federal law is a *pivotal* issue in the case, one that is basic in the determination of the conflict between the parties." *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978) (emphasis supplied). *See also Gully v. First Nat'l Bank*, 299 U.S. 109, 117-18 (1936). In a recent case involving the disasterous oil spill off the French coast by the tanker *Amoco Cadiz*, a federal court articulated the "arising under" test in the following terms:

> A suit arises under the Constitution, laws or treaties of the United States where it *actually and substantially* involves a dispute or controvery concerning the validity or interpretation of such federal issues, the determination of which will have a *direct impact* on the plaintiff's success or failure.

Chapalain Compagnie v. Standard Oil Co. (Indiana) 467 F. Supp. 181, 184 (N.D. Ill. 1978) (emphasis supplied).

In the instant case, no American treaty or the law of nations is a pivotal substantive issue, "the determination of which will have a direct impact on plaintiff's success or failure." Similarly, these cases do not require "construction of an Act of Congress" and they involve no distinctive policy questions which require that federal principles control disposition of the claims. *See Ivy Broadcasting Co. v. AT&T,* 391 F.2d at 493. Rather, as violent as the March 11 incident may have been, this case involves straightforward allegations of intentional torts. This conclusion is not altered by Plaintiffs' frequent use of terms such as "torture" and "genocide."

The lack of substance of Plaintiffs' federal claims is clearly demonstrated by an examination of the Complaint. In Count I, Plaintiffs allege such torts as assault, battery and false imprisonment. J.A. Vol. I, at 21a. The remaining Counts do not contain allegations of any different acts by defendants. Rather, Plaintiffs repeat the same allegations but use different labels to describe the substantive law. However, this does not mean that Plaintiff's right to recover involves federal laws or treaties in any manner, much less the "pivotol," "substantial" and "direct" involvement required under applicable case law. Plaintiffs' right to recover rests on only one thing: factual support for the bald allegations that the NAAA did, in fact, commit the acts asserted.

The foregoing constitutes a sufficient basis for the District Court's rejection of Section 1331 jurisdiction. There is, however, further reason that such jurisdiction cannot be sustained: neither the treaties cited by Plain-

tiffs nor the law of nations provides any basis for the private cause of action which Plaintiffs assert against the NAAA.

Section 1331 requires that claims *arise under* United States treaties or under the law of nations which is part of the federal common law. However, many of the so-called "treaties" cited by Plaintiffs are not, in fact, treaties at all. Indeed, eight of the thirteen "treaties" are not presently treaty obligations of the United States, as documented by the United States Department of State in its annual publication entitled *Treaties In Force.*[23] Accordingly, no Section 1331 jurisdiction can arise from these defective allegations.

Further, the actual treaties[24] cited by Plaintiffs do not provide any judicially enforceable rights. A treaty is a contract between the United States and other signatories of the treaty. When ratified, a treaty becomes the law of the United States, and, as such, *may* confer rights capable of judicial enforcement. However, the general rule is that treaties do not confer any privately enforce-

---

[23] The "treaties" which are not, in fact, U.S. treaty obligations are those set forth in paragraphs 110, 112-115 and 117-119 of the Complaint. *See* J.A. Vol. I, at 27a-29a, 129a-130a, 132a-136a; Department of State, Treaties Affairs Staff, Office of the Legal Advisor, *Treaties In Force* (Publication 9136) (1980).

[24] The law of nations as part of the federal common law is not separately addressed herein, insofar as Section 1331 jurisdiction is concerned. Every "treaty" cited by Plaintiffs in Count III of the Complaint is also listed under Count II concerning the law of nations. There are 10 alleged laws of nations that are not also listed as treaties, but each is redundant of the treaties which are discussed. *See* J.A. Vol. I, at 22a-29a. Clearly, if a treaty provides Plaintiffs no cause of action, calling it part of the law of nations does not provide a cause of action either.

able rights and thus are deemed to be "executory" with respect to the rights of private individuals. Accordingly, except where a treaty is self-executing (and this is generally *not* the rule), Congress must implement the treaty though legislation before the treaty gives rise to a private right of action. *E.g., Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1298 (3d Cir. 1979); *Diggs v. Richardson,* 555 F.2d 848, 850-51; *Dreyfus v. von Finck,* 534 F.2d 24, 29-30; *Chapalain Compagnie v. Standard Oil Co. (Indiana),* 467 F. Supp. 181, 184.

There is no precise rule for determining whether a particular treaty constitutes an exceptional case such that it is self-executing and provides a person with privately enforceable rights for its violation. However, there are certain interpretive guides which courts rely upon to determine whether a treaty is executory or self-executing. First, if a treaty calls for each country to enact legislation concerning the treaty, it universally is held to be executory and thus no private rights are conferred by it. *See United States v. Postal,* 589 F.2d 862, 876-77 (5th Cir.), *cert. denied,* 444 U.S. 832 (1979).

Second, courts look to the words of a treaty to determine whether it evidences an intent to confer judicially enforceable rights upon individuals or whether it addresses governmental actions. For example, in *Diggs v. Richardson,* 555 F.2d 848, this Court considered whether a United Nations resolution calling for nations to abstain from trade and other contacts with Namibia and South Africa gave rise to an implied right of action. The resolution stated that such contacts might "entrench" white authority over those areas. *Id.* at 849. The court found the resolution executory:

> [W]e find that the provisions here in issue were not addressed to the judicial branch of our government. They do not by their terms confer rights upon individual citizens; they call upon government to take certain action. The provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion . . . . The Resolution does not provide specific standards. The 'entrenchment' standard of the Resolution, while possibly of such a nature that it might be elaborated by an international tribunal, is essentially the kind of standard that is rooted in diplomacy and its incidents, rather than in conventional adjudication, and is foreign to the general experience and function of American courts. In the absence of contrary indication in the international legislative history, and in the absence of domestic legislation evincing an intention for judicial enforcement, we conclude that the provisions of Resolution 301 involved here do not confer on individual citizens rights that are judicially enforceable in American domestic courts.

555 F.2d at 851 (footnotes deleted). Similarly, in *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952), the California Supreme Court stated:

> In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts

38 Cal. 2d at 721-22; 242 P.2d at 620.[25]

---

[25] The approach in *Diggs v. Richardson* and *Sei Fujii v. State*, in focusing on the intention manifested in the treaty, is similar to that of the Supreme Court in recent cases regarding whether an implied right of action arises under various federal statutes. *See e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cort v. Ash*, 422 U.S. 66 (1975). Accordingly, under *Diggs*, *Sei Fujii*, and these Supreme Court

(Continued on next page)

The NAAA demonstrated in detail to the District Court that none of the "treaties" alleged by Plaintiffs to provide a cause of action arising under federal laws in fact provided such a cause of action. *See* J.A. Vol. I, at 132a-136a.[26] The District Court also examined these treaties and reached the same conclusion. J.A. Vol. II, at 124a-129a. Plaintiffs have failed on appeal to demonstrate any basis to set aside the District Court's holding.

For instance, Plaintiffs make the following argument regarding the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

> An examination of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, indicates that its essential purpose is directed to protecting the rights of persons who are civilians. It confers individual rights on such persons. It describes in detail that these individuals are to be free from acts of torture, terror, hostage-taking and genocide. The rights given to individuals are clear, enforceable and unmistakable. They are enforceable in United States courts without the enactment of any new legislation and without the Congress providing any additional funds.

Plaintiffs' Brief, p. 41. However, it is *not* enough simply to *allege* that the Convention confers rights which are en-

---

(Continued from previous page)

decisions, it is appropriate for this Court to inquire whether the treates in question manifest a clear intention that private rights be created and whether, if so, plaintiffs are within that special class of persons intended to be protected by the treaty. Since plaintiffs cannot demonstrate that the treaties were designed to provide a private right of action to any person, their reliance on these treaties for federal jurisdiction cannot be sustained.

[26] The portions of the treaties cited by Plaintiffs in the Complaint are found in the Joint Appendix, Vol. I, at 164a-286a.

forceable. Rather, it is the language of the Convention which must be examined to discern whether a cause of action may be inferred. When the Convention is examined, it is clear that Article 146 specifically calls for nations to enact implementing legislation. J.A. Vol. 1, at 169a. This is a clear indication that the treaty is executory and provides no cause of action to Plaintiffs without Congressional action. *See United States v. Postal,* 589 F.2d 862.

In conclusion, Plaintiffs have failed to demonstrate that any treaty or the law of nations provides a private cause of action for their grievances. They further fail to demonstrate that federal law will be substantially implicated in resolution of these claims. Accordingly, Section 1331 provides no jurisdiction.

III. The District Court was Correct in Ruling that Plaintiffs' Claims are Barred by the Statute of Limitations

In addition to dismissing the Complaint for lack of subject matter jurisdiction, the District Court also ruled that dismissal was required due to expiration of the applicable statute of limitations. J.A. Vol. II, at 133a-134a. This Court should affirm this action.

The District Court ruled (and Plaintiffs do not disagree) that D.C. Code § 12-301 provides the applicable statute of limitations. J.A. Vol. II, at 133a.[27] Section 12-301

---

[27] The District Court was unquestionably correct in applying D.C. Code § 12-301. Under the principles of *Erie R.R. v. Thompkins,* 304 U.S. 64 (1938), as applied to the federal courts in the District of Columbia, the District Court looked

(Continued on next page)

specifies a one-year limitation period "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment . . . ." D.C. Code § 12-301(4). Section 12-301(8) provides a 3-year limitations period for causes of action "for which a limitation is not otherwise specially prescribed . . . ."

The District Court ruled that Plaintiffs' claims, *in substance,* constituted intentional torts of the kind delineated in D.C. Code § 12-301(4). Indeed, Plaintiffs specifically alleged assault, battery, and false imprisonment under each Count of the Complaint.[28] Accordingly, the District Court ruled that all Plaintiffs' claims were barred by the applicable one-year limitations period. J.A. Vol. II, at 133a-134a.

The NAAA submits that the District Court was clearly correct in applying the one-year limitations period to all of Plaintiffs' intentional tort claims. Count I purports to assert a cause of action based on "the *intentional* torts of assault, battery, false imprisonment, intentional infliction

---

(Continued from previous page)

to District of Columbia law to determine which statute of limitations to apply to Plaintiffs' claims. *Steorts v. American Airlines, Inc.*, 647 F.2d 194 (D.C. Cir. 1981). *See also Lee v. Flintkote Co.*, 593 F.2d 1275 (D.C. Cir. 1979). It is established under District of Columbia law that "a limitation on the time of [bringing a] suit is procedural and is governed by the law of the forum." *Kaplan v. Manhattan Life Ins. Co.*, 109 F.2d 463, 465-66 (D.C. Cir. 1939); *accord, Hodge v. Southern Ry.*, 415 A.2d 543 (D.C. 1980); *May Department Stores Co., Inc. v. Devercelli*, 314 A.2d 767 (D.C. 1973). Since a District of Columbia court would apply its own statute of limitations to an action before it, regardless of where the cause of action might have arisen, it is clear that the District Court similarly was required to apply the D.C. statute of limitations to Plaintiffs' claims. *Steorts v. American Airlines, Inc.*, 647 F.2d 194.

[28] J.A. Vol. I, at 21a, 22a, 27a, 29a-30a, 32a.

of mental distress and/or intentional infliction of cruel, inhuman and degrading treatment...." J.A. Vol. I, at 22a (emphasis supplied). The allegedly tortious acts are described by Plaintiffs as follows:

> The defendants tortured, terrorized, humiliated, wounded, injured, held hostage, threatened, inflicted mental distress upon, assaulted and battered the plaintiffs and otherwise subjected the plaintiffs to cruel, inhuman and degrading treatment.

J.A. Vol. I, at 21a. It is beyond dispute that Plaintiffs' claims for assault, battery and false imprisonment are time-barred by the one-year limitations period of Section 12-301(4). Plaintiffs' remaining claims are similarly barred. The allegations that Plaintiffs denominate as "causes of action" for the additional so-called "intentional torts" of "infliction of mental distress" and "infliction of cruel, inhuman and degrading treatment," do not state separate or distinct rights of action. Indeed, Plaintiffs do not even purport to allege any facts to support the independent existence of these so-called "causes of action." Instead, these "causes of action" clearly arise out of the same conduct which allegedly constitutes the assault, battery, and false imprisonment. Thus, in Count I, Plaintiffs have done no more than assign two additional labels to the conduct.[29]

---

[29] Assuming for the sake of argument that the law of the District of Columbia would recognize independent causes of action for the so-called torts of infliction of mental distress and infliction of cruel, inhuman and degrading treatment, no such torts are properly pleaded in the Complaint. The infliction of mental distress and of cruel, inhuman and degrading treatment, as pleaded by Plaintiffs in Count I, are obviously nothing more than supplemental descriptions of conduct which is fully encompassed by the traditional common law intentional torts of assault, battery, and false imprisonment.

The District Court properly rejected Plaintiffs' attempt to circumvent the one-year statute of limitations in their Count I allegations. Congress clearly intended Section 12-301(4) to apply to all intentional torts of the type asserted in Count I. The mere fact that Plaintiffs came up with new words to describe the traditional terms chosen by Congress in drafting the statute does not change the *substance* or the *nature* of the claims asserted by Plaintiffs in Count I.[30]

It is well established that "the label which a plaintiff applies to a pleading does not determine the nature of the cause of action which he states." *Aktiebolaget Bofors v. United States,* 194 F.2d 145, 148 (D.C. Cir. 1951). *Accord, Johnson v. United States,* 547 F.2d 688 (D.C. Cir. 1976); *Blitz v. Boog,* 328 F.2d 596, 599 (2d Cir.), *cert. denied,* 379 U.S. 855 (1964) ("It is, of course, the substance of the claim, and not the language used in stating it, that controls.") *Universal Airline v. Eastern Air Lines,* 188 F.2d 993 (D.C. Cir. 1951); *Hendry v. United States,* 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd,* 418 F.2d 774 (2d Cir. 1969).

Furthermore, as this Court held in ruling that the *nature* of a claim determines which statute of limitations

---

30 Plaintiffs' argument would clearly raise form over substance. The courts have long recognized that statutes must be read flexibly to accomplish their intended purpose and in a manner which recognizes the evolving nature of the law. *See Filartiga v. Pena-Irala,* 630 F.2d 876, 881 (courts must interpret international law not as it was in 1789 when Section 1350 was enacted but as it exists today). The clear purpose of Section 12-301(4) was to specify a uniform one-year limitations period for all intentional torts involving violence. Plaintiffs' interpretaton, however, would require continued Congressional amendment in the face of an evolving law of torts in order for Congress to accomplish its purposes. Such an unyielding interpretation of the law is improper.

applies, "the statute of limitations . . . . cannot be evaded by referring to [a] cause of action in some other terms." *Universal Airline v. Eastern Air Lines,* 188 F.2d at 996. Thus, because Count I, in substance, alleges nothing more than claims for the intentional torts covered by Section 12-301(4), the one-year limitations period of that statute must be applied.

Similarly, Counts II, III, and V of the Complaint are also barred by Section 12-301(4).[31] In Counts II and III, Plaintiffs merely restate the substantive allegations of Count I and then supply yet another set of labels to those intentional tort claims. Count V, which also repeats the same Count I substantive allegations, purports to state a claim for conspiracy to commit the torts alleged in Counts I through IV. J.A. Vol. I, at 21a, 22a, 27a, 29a-30a, 32a.

As noted above, a court must examine the *substance* of a party's claims to determine which statute of limitations to apply. The substance of the Count II, III, and V claims is clearly identical to that of the claims in Count I—intentional torts. Like Count I, therefore, Counts II, III and V are subject to the one-year limitations period of D.C. Code § 12-301(4) and, accordingly, they are time-barred and were properly dismissed.

Plaintiffs' nevertheless attempt to evade the rule that courts look to the *substance* of Plaintiffs' claims, rather than the labels, in determining the applicable limitation period. Thus, before this Court, Plaintiffs urge that the

---

[31] Plaintiffs have not contested the Court's ruling that Count IV is barred by the statute of limitations. *See* Plaintiffs' Brief, p. 45. The analysis which follows, however, would apply equally to Count IV.

"torts" of intentional infliction of emotional distress and intentional infliction of cruel, inhumane and degrading treatment are "distinct" from the other enumerated torts and thus must be governed by a three-year limitation period. Plaintiffs' Brief, pp. 43-44. Plaintiffs make the same basic argument regarding Counts II, III and V:

> These tort claims [alleged violation of the law of nations and treaties and alleged conspiracy] are different from the common law tort claims asserted in Count I because the legally protected interests at stake and the nature and purpose of the tortious conduct at issue are different.

Id. at 46.

This Court must reject this argument. As previously noted, the same conduct is at issue in all Counts of the Complaint. Thus, while the labels are different, the *substance* is exactly the same. Moreover, Plaintiffs themselves have alleged that the cause of action they are pursuing arises under so-called "municipal law," not under the law of nations or other international law. Plaintiffs' Brief at 25. In arising under such municipal law, its *substance* is in fact identical to the other "municipal" claims, such as assault and battery which clearly are time barred.

Plaintiffs also urge that important federal policies would be thwarted if this Court applied a one-year limitation period to Counts II, III and V.

> In ratifying the treaties and enacting the statutes relied upon herein, including 28 U.S.C. § 1350, it is reasonable to infer that Congress did not intend that the exercise of the federal rights thereby created was to be burdened by an unreasonably short state statute of limitations.

Plaintiff's Brief, p. 48. The District Court properly rejected this claim. J.A. Vol. II, at 134a. It is pure, unsupported speculation to infer as Plaintiffs suggest, that Congress, in enacting Section 1350 in 1789 or the various treaties and other laws cited by Plaintiffs, wanted to be sure that a longer limitations period applied. Rather, the policy of Congress has been expressed in D.C. Code § 12-301, as interpreted by the courts. That policy is that there shall be prompt resolution of intentional tort claims involving violence, regardless of the label which is applied. Plaintiffs now, in fact, seek to thwart that policy by arguing, in essence, that certain of the Count I common law claims are properly barred but that the so-called "federal" claims of Counts II, III and V—claims which involve the precise same conduct as Count I—are not barred. This is manifestly inconsistent with Section 12-301 and inconsistent with the stated policy of narrowly construing 28 U.S.C. § 1350. *See IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015.

Finally, Plaintiffs' frequent use of emotional code words such as "torture," "genocide," and "terrorism" in describing the tortious acts complained of, as well as their ceaseless incantation of the "law of nations," should not distract this Court from the required analysis of the *substance* of Plaintiffs' claims. This is not meant to imply that Plaintiffs' injuries or suffering were necessarily any less than as alleged in the Complaint; merely that fear is fear, pain is pain, and injury is injury, regardless of where, by whom, or for what reasons it may have been inflicted. In enacting Section 12-301(4), Congress plainly intended to prohibit persons from sitting on known causes of action—those arising from intentional torts—by requiring such ac-

tions to be brought within a year. Plaintiffs' claims are therefore time-barred.

———o———

CONCLUSION

For the foregoing reasons, the NAAA respectfully urges this Court to affirm the District Court's dismissal of these actions.

Respectfully submitted,

Kirkpatrick, Lockhart, Hill,
Christopher & Phillips

By: /s/ Lawrence Coe Lanpher
Cherif Sedky
Lawrence Coe Lanpher

1900 M Street, N.W.
Washington, D. C. 20036
(202) 452-7000

Attorneys for Appellee National
Association of Arab Americans, Inc.

Dated: December 21, 1981
Washington, D. C.

Office-Supreme Court, U.S.
FILED
JUL 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2052

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,
v.
LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,
v.
LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONERS HANOCH TEL-OREN, *ET AL.*

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN & MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATUTORY PROVISIONS INVOLVED	1
ARGUMENT	3

TABLE OF AUTHORITIES

Cases:

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972)	7
Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977)	6
Granville v. Hunt, 411 F.2d 9 (5th Cir. 1969)	8
Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972)	8
Miree v. Dekalb County, Georgia, 433 U.S. 25 (1977)	8
Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981)	6

Statutes:

D.C. Code Ann. § 12-301	1
D.C. Code Ann. § 12-301 (4)	2, 4, 5, 6, 7
D.C. Code Ann. § 12-301 (8)	2, 5, 6, 7
D.C. Code Ann. § 12-302	2, 3, 7

Miscellaneous:

Prosser, *Law of Torts* (4th Ed. 1971)	5, 6
Restatement (Second) of Torts (1977)	5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2052

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF PETITIONERS HANOCH TEL-OREN, *ET AL.*

Petitioners, Hanoch Tel-Oren, *et al.*, respectfully submit this Reply Brief in support of their prayer for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 3, 1984.

STATUTORY PROVISIONS INVOLVED

D.C. Code Ann. § 12-301 provides:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified

below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments—15 years;

(2) for the recovery of personal property or damages for its unlawful detention—3 years;

(3) for the recovery of damages for an injury to real or personal property—3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;

(5) for a statutory penalty or forfeiture—1 year;

(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;

(7) on a simple contract, express or implied—3 years;

(8) for which a limitation is not otherwise specially prescribed—3 years;

(9) for a violation of the District of Columbia Mental Health Information Act of 1978 (D.C. Code, sec. 6-1611 [6-2001] et seq.)—1 year.

This section does not apply to actions for breach of contracts for sale governed by § 28:2-725.

D.C. Code Ann. § 12-302 provides:

(a) Except as provided by subsection (b) of this section, when a person entitled to maintain an action is, at the time the right of action accrues:

(1) under 18 years of age; or

(2) noncompos mentis; or

(3) imprisoned—

he or his proper representative may bring action within the time limited after the disability is removed.

> (b) When a person entitled to maintain an action for the recovery of lands, tenements, or hereditaments, or upon an instrument under seal, is under any of the disabilities specified by subsection (a) of this section at the time the right of action accrues, he or his proper representative, except where otherwise specified herein, may bring the action within 5 years after the disability is removed, and not thereafter.

ARGUMENT

In its Brief in Opposition to the Petition for a Writ of Certiorari ("Respondent's Brief"), respondent has seriously distorted and mischaracterized the decision below of the United States Court of Appeals for the District of Columbia Circuit. On the one hand, respondent asserts that the Court of Appeals' two-page *per curiam* statement constitutes the court's entire decision, and that the three concurring opinions, totalling one hundred fourteen (114) pages, constitute "mere *dicta*." Respondent's Brief at 5. At the same time, however, respondent cites at least one of the concurring opinions as expressing the "ruling" of the Court of Appeals. *See, e.g., id.* at 16. Thus, respondent presents two inconsistent versions of the lower court's decision, relying on the concurrences when they support respondent's argument and dismissing them as *dicta* when they do not. Furthermore, respondent contends that the Court of Appeals ruled on two issues—the statute of limitations and insubstantiality claims—which it did not in fact reach in rendering its decision.

Respondent raises a total of six arguments which, it contends, preclude review by this Court. While all of these claims are without merit, the statute of limitations and insubstantiality issues are discussed herein in order to clarify their status below and demonstrate the lack of foundation for respondent's arguments relating thereto.

Respondent's initial argument in opposition to the Petition for a Writ of Certiorari is that the "courts below,"

Respondent's Brief at 8, properly dismissed the Complaint as time-barred by the one-year statute of limitations set forth in D.C. Code Ann. § 12-301(4). Respondent contends that the District Court's ruling on the statute of limitations issue was "specifically referred to" by the Court of Appeals, *id.* at 9, that it "was not disturbed in any way" by the Court of Appeals, *id.*, and that it was therefore affirmed by the Court of Appeals. In addition, respondent asserts that petitioners have "virtually conceded that their action is barred by the statute of limitations . . . [because] the Petition contains not a single mention of the statute of limitations." *Id.* at 9-10.

Even a cursory examination of the Petition, the decision of the Court of Appeals and the relevant statute and case law reveals that respondent's contentions are without merit. First, the statute of limitations issue was, in fact, expressly referred to in the Petition, *see* Petition at 6 n.2, as petitioners stated that the District Court erred in finding their claims to be time-barred. Second, that issue, while part of the District Court's ruling, was not reached by the Court of Appeals. This fact was clearly acknowledged by Judge Bork, *see* App. IA at 53a n.2 (Bork, J., concurring), as well as by respondent, who concedes that "none of the three concurring opinions reached the issue." Respondent's Brief at 9. Indeed, had the Court of Appeals adopted the District Court's ruling on the limitations issue, as contended by respondent, surely it would not have devoted one hundred fourteen (114) pages to a discussion of the various substantive issues presented. Respondent suggests that the Court of Appeals' mere mention of the District Court's ruling on the limitations issue, *see* App. IA at 3a, constitutes an affirmation of that ruling. Such an interpretation, however, distorts the scope of the Court of Appeals' decision and contradicts Judge Bork's express statement to the contrary.

A third flaw in respondent's reasoning lies in its interpretation of the District of Columbia limitations statute.

Section 12-301(4) provides a one-year limitations period for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment." D.C. Code Ann. § 12-301(4). Section 12-301(8) mandates a three-year period where "a limitation is not otherwise specially prescribed" by the Code. D.C. Code Ann. § 12-301(8). The inclusion of this general provision evidences a clear legislative intent that the seven preceding sections, including section 12-301(4), are meant to apply only to the specific actions enumerated therein, and to no others.

Petitioners' claims for intentional infliction of emotional distress, for intentional infliction of cruel, inhuman and degrading treatment, and for the claims set forth in Counts II, III and V are governed by section 12-301(8), since they are not among those actions identified in section 12-301(4). Indeed, respondent's contention that such claims all arise out of an assault and thereby "do not state separate or distinct rights of action," Respondent's Brief at 8, is directly contrary to the statutory language noted above, general tort principles and binding case law.

The intentional infliction of emotional distress, for example, is recognized as an actionable tort, independent and distinct from the torts of assault and battery. *See* Prosser, *Law of Torts* (4th ed. 1971) § 12 at 56-59; Restatement (Second) of Torts § 46 comments a, k (1977). Comment a to the Restatement states this principle unequivocally:

> [T]he rule stated in this Section [dealing with outrageous conduct causing severe emotional distress] has been fully recognized as a *separate and distinct basis of tort liability*, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like.

Respondent's statute of limitations argument is thus contrary to the Restatement of Torts. It is also directly

contradicted by the opinion of the United States Court of Appeals in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). There, a federal employee, having resigned his position under false charges of homosexual conduct, brought suit alleging the torts of fraudulent misrepresentation, defamation of character, interference with economic advantage, intentional infliction of severe emotional distress and violation of the constitutional rights to privacy, due process and immunities of citizenship. Rather than treating these claims as one single action because they purportedly arose out of the same conduct, as respondent would have the Court do in the instant case, the D.C. Circuit found that plaintiff's claims were separate and independent and, therefore, governed by different limitations periods. The court, in a ruling indistinguishable from the instant case, held that the defamation claim was governed by the one-year period of section 12-301(4), and, significantly, that the allegation of intentional infliction of emotional distress was governed by the three-year period of section 12-301(8). *Id.* at 68 n.5.[1] *See also Fitzgerald v. Seamans*, 553 F.2d 220, 223 (D.C. Cir. 1977).

The reasoning adopted by Prosser, the Restatement and the *Richards* court fully applies to the case at bar. Petitioners have suffered severe and permanent emotional trauma as a result of observing the barbaric execution of loved ones and others during the March 11, 1978 attack, and experiencing the brutal torture and kidnapping inflicted by the Libyan-backed terrorists. The emotional distress engendered by such events is a compensable harm, wholly distinct from any bodily injury or apprehension of bodily injury which petitioners themselves suffered. Claims predicated upon that distress are governed,

---

[1] The court presumably treated the defamation claim as one for libel and slander, actions specifically enumerated in section 12-301(4).

therefore, not by the limitations period for assault or battery but by the period set forth in section 12-301(8).

Even if respondent's argument concerning the applicability of section 12-301(4) is accepted, petitioners' lawsuit may still be maintained. Section 12-302 provides that when a person is under the age of eighteen when his cause of action accrues, "he or his proper representative may bring action within the time limited after the disability is removed." D.C. Code Ann. § 12-302. Since thirty-four of the persons killed or injured in the terrorist attack were under the age of eighteen when the attack occurred, and did not attain the age of eighteen prior to the filing of the Complaint, their claims cannot be time-barred, regardless of the statute of limitations found to be applicable. *See Canterbury v. Spence*, 464 F.2d 772, 793 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) ("[f]or one a minor when his cause of action accrues, they [the statutes of limitations] do not begin to run until he has attained his majority.").[2]

Respondent also contends that petitioners' allegations against it are conclusory and too insubstantial to state a cause of action, and asserts that the "courts below," Respondent's Brief at 10, properly dismissed the Complaint on this basis. This argument suffers from two principal defects.

First, the "courts below" did not, in fact, dismiss the Complaint on the basis that the allegations against respondent are insubstantial. While insubstantiality served as a premise for the District Court's ruling, that issue, like the statute of limitations question, was never reached by the Court of Appeals: "Nor need we reach the district court's dismissal of the action against the NAAA . . . on the ground that the allegations of the complaint were insufficiently specific." App. A at 53a n.2 (Bork,

---

[2] Curiously, respondent completely ignores the claims of the minor petitioners in its statute of limitations discussion.

J., concurring). Respondent errs, therefore, in implying that the Court of Appeals affirmed dismissal because "none of the three concurring opinions questioned or disagreed with the insufficiency holding." Respondent's Brief at 11-12.

Second, petitioners' Complaint does far more than simply set forth conclusory allegations relating to respondent's participation in the terrorist attack. The Complaint asserts, for example, that respondent planned the terrorist operation, conspired with the other defendants to bring it about, raised funds and procured arms, boats, hand grenades and other equipment in furtherance of the operation. App. IIA at 19-20.[3]

Accordingly, petitioners' allegations are far more specific than those in the cases relied upon by respondent. In *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969), for example, plaintiff, a Florida inmate, brought suit against corrections officials. With respect to his conspiracy claim, plaintiff alleged only that defendants "conspired against . . . [him] and that as a result of this conspiracy, he was subjected to cruel and unusual punishment." *Id.* at 11. The dismissal of plaintiff's complaint was affirmed on the ground that such allegations were conclusory and "fail[ed] 'to allege any overt acts related to the promotion of the claimed conspiracy.'" *Id.* (citation omitted).[4]

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

---

[3] These allegations, of course, are to be accepted as true in ruling on a motion to dismiss. *Miree v. Dekalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977).

[4] The allegation of specific, additional facts concerning respondent's participation in the terrorist attack also distinguishes this action from *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972), relied upon by respondent.

Respectfully submitted,

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN
& MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

July 24, 1984

No. 83-2052

Office-Supreme Court, U.S.
FILED
JAN 30 1985
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

HANOCH TEL-OREN, ET AL., PETITIONERS

v.

LIBYAN ARAB REPUBLIC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
ROBERT E. KOPP
JOHN M. ROGERS
HAROLD H. KOH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's dismissal of petitioners' claims for lack of subject matter jurisdiction under 28 U.S.C. 1331 and 1350.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 12
Filartiga v. *Pena-Irala*, 630 F.2d 876 ..... 5, 7, 10
Huynh Thi Anh v. *Levi*, 586 F.2d 625 8
IIT v. *Vencap, Ltd.*, 515 F.2d 1001 12
McKeel v. *Islamic Republic of Iran*, 722 F.2d 582, cert. denied, No. 83-1890 (Oct. 9, 1984) 13
Persinger v. *Islamic Republic of Iran*, 729 F.2d 835, cert. denied, No. 84-47 (Oct. 9, 1984) 13
Siderman de Blake v. *Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984) 12
United States v. *Mendoza*, No. 82-849 (Jan. 10, 1984) 12

Treaty and Statutes:

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 8

Foreign Sovereign Immunities Act:

28 U.S.C. 1330 4
28 U.S.C. 1602-1611 4
28 U.S.C. 1605(a)(5) 13

Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 6
28 U.S.C. 1331 ..... 2, 3, 4, 6, 7, 8
28 U.S.C. 1332 2
28 U.S.C. 1350 ..... 2, 3, 5, 6, 7, 8, 9, 11, 12
D.C. Code Ann. § 12-301(4) (1981) 2

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2052

HANOCH TEL-OREN, ET AL., PETITIONERS

v.

LIBYAN ARAB REPUBLIC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case arises out of an armed attack on a civilian bus in Israel on March 11, 1978. Petitioners are Israeli, Dutch, and American citizens who either were injured in the attack or are the survivors of persons killed. Respondents are the Libyan Arab Republic (Libya),[1] the Palestine Liberation Organization (PLO), and two Arab-American groups, the

[1] Although the caption of this case identifies Libya as the Libyan Arab Republic, the official name of the country is the Socialist People's Libyan Arab Jamahiriya.

Palestine Information Organization (PIO) and the National Association of Arab Americans (NAAA).

Petitioners filed suit in the United States District Court for the District of Columbia in March 1981, alleging that respondents were responsible for the 1978 attack and seeking compensatory and punitive damages (Br. in Opp. App. 1-94). Petitioners contended that the PLO had planned, supplied, and financed the attack and had recruited and trained the terrorists who carried it out; that Libya also had planned, supported, and ratified the attack; and that the Arab-American groups had helped to plan, finance, outfit, and direct the operation (Pet. App. 53a-55a; Br. in Opp. App. 17-20).

The complaint charged respondents with various common law intentional torts, and with tortious actions in violation of the law of nations, treaties of the United States, and various United States criminal statutes (Br. in Opp. App. 20-35). The complaint also contained a conspiracy count as to these allegations (*id.* at 35-37). Petitioners alleged jurisdiction under the federal question statute, 28 U.S.C. 1331, and the alien tort statute, 28 U.S.C. 1350.[2] Petitioners apparently failed to complete service upon Libya and the PLO, and neither of those defendants appeared before the district court (Pet. App. 116a n.1; *id.* at 129a n.4). The PIO moved for summary judgment, and the NAAA moved to dismiss the action for lack of subject matter jurisdiction and failure to comply with the District of Columbia statute of limitations, D.C. Code Ann. § 12-301(4) (1981) (Pet. App. 116a).

---

[2] The complaint also asserted jurisdiction under 28 U.S.C. 1330 and 1332, but petitioners abandoned these grounds of jurisdiction in the court of appeals (Pet. App. 54a n.3).

2. The district court dismissed the action against all defendants for lack of jurisdiction and because of the statute of limitations (Pet. App. 130a). The district court held first that it lacked federal question jurisdiction under 28 U.S.C. 1331 because the complaint stated no federal private right of action arising under federal criminal statutes (Pet. App. 117a-118a), treaties of the United States (*id.* at 118a-122a), or federal common law, including the law of nations (*id.* at 122a-123a).

The district court next held that it lacked jurisdiction over any of the defendants under the alien tort statute, 28 U.S.C. 1350, which confers federal subject matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The district court ruled that Section 1350 "in no way provides a cause of action" but "serves merely as an entrance into the federal courts" (Pet. App. 125a).[3] The court concluded that petitioners had failed to demonstrate that either the law of nations or any treaty of the United States conferred a federal private right of action upon them, and therefore they had not met the "jurisdictional prerequisite to § 1350 that a complaint * * * plead a private right of action" (Pet. App. 127a).

With respect to the three Arab-American organizations named as defendants,[4] the district court also

---

[3] The district court did not reach the question whether the conduct complained of violated the law of nations. Pet. App. 119a.

[4] In addition to the PIO and the NAAA, petitioners' complaint also named as a defendant a third Arab-American group, the Palestine Congress of North America (PCNA). The district court dismissed the action against the PCNA on the same grounds as the action against the two other

reasoned that "[t]hese three defendants have not been connected to the claimed torts sufficiently to permit the action to proceed against them," concluding that "vague, conclusory allegations of conspiracy are insufficient to predicate an action for damages" (Pet. App. 127a). As an alternative basis for dismissal against all defendants, the district court ruled that petitioners had failed to bring suit within the applicable one-year District of Columbia statute of limitations (*id.* at 127a-129a).

3. The court of appeals affirmed the dismissal of the action in a brief per curiam order (Pet. App. 1a-3a). Judge Edwards, Judge Bork, and Senior Judge Robb each filed a separate concurring opinion indicating different reasons for affirming the result reached by the district court (*id.* at 4a-114a).

a. Judge Edwards focused on the construction of the alien tort statute as applied to the allegations against the PLO.[5] While finding that the law of na-

---

Arab-American groups, and petitioners did not pursue their claims against the PCNA on appeal (Pet. App. 2a n.1).

[5] In a footnote, Judge Edwards agreed with the district court that jurisdiction over Libya was barred by the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-1611, and that petitioners' allegations against the Arab-American organizations were "too insubstantial to satisfy the § 1350 requirement that a violation of the law of nations be stated" (Pet. App. 4a n.1). Judge Edwards also disposed of petitioners' reliance on 28 U.S.C. 1331 in a footnote. He was willing to assume for the sake of argument that the law of nations constitutes a "law of the United States" for purposes of the federal question statute, but he concluded that petitioners could not identify any right to sue granted by the law of nations and also observed that "the law of nations quite tenably does not provide these plaintiffs with any substantive right that has been violated" (Pet. App. 13a n.4). Judge Edwards expressed no view on the correctness of the district court's statute of limitations ruling.

tions provides no right to sue, Judge Edwards read *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as holding that the alien tort statute itself provides a cause of action (Pet. App. 5a-14a). Judge Edwards endorsed that view, but he reasoned that the cause of action provided by Section 1350 is limited to "international crimes"—"a handful of heinous actions—each of which violates definable, universal and obligatory norms" (Pet. App. 16a-17a). He concluded that the PLO's acts of terrorism did not violate international law because "the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus" (*id.* at 46a). Judge Edwards thus concluded that "under current law terrorist attacks [do not] amount to law of nations violations" (*ibid.*). Finally, Judge Edwards was of the view that petitioners could not allege that the PLO's acts of terrorism violated international law because "[t]he Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law" (*id.* at 37a).[6]

b. Judge Bork agreed with Judge Edwards (see note 5, *supra*) that "Libya must be dismissed from the case because the Foreign Sovereign Immunities Act * * * plainly deprives us of jurisdiction over

---

[6] Judge Edwards also put forth an alternative hypothesis with respect to the meaning of the alien tort statute. Under that theory, the statute was simply intended "to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis" (Pet. App. 19a). Even under this theory, however, Judge Edwards concluded that petitioners could not maintain their suit because of the PLO's status as a non-state and the absence of any international consensus that politically-motivated terrorism is an international crime.

Libya" (Pet. App. 66a-67a n.13). With respect to the PLO, Judge Bork adopted the district court's conclusion that petitioners had failed to state a cause of action sufficient to support jurisdiction under either 28 U.S.C. 1331 or 1350 (Pet. App. 53a-54a). Judge Bork reasoned that the separation of powers principles underlying the act of state and political question doctrines counseled against recognizing any cause of action not expressly granted (*id.* at 58a-73a), and he agreed with the district court that Section 1350, like Section 1331, is purely jurisdictional, neither expressly nor impliedly creating a private cause of action (Pet. App. 79a-90a). Judge Bork suggested that Section 1350, which was enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77, may have been intended to provide jurisdiction for causes of action expressly authorized by treaty and perhaps for the three international crimes recognized by Blackstone—violation of safe conducts, infringement of the rights of ambassadors, and piracy (Pet. App. 84a-85a). The meager history of the statute led Judge Bork to conclude that any broader reading of the jurisdictional grant would be contrary to congressional intent (*id.* at 81a-83a).[7]

c. Without addressing the jurisdictional issue raised by Section 1350 or the applicability of the local statute

---

[7] Because he found that the complaint was correctly dismissed on jurisdictional grounds, Judge Bork did not reach the questions whether the district court had properly dismissed the action against the Arab-American organizations on the grounds that the allegations of the complaint were insufficiently specific and the action was barred by the local statute of limitations (Pet. App. 53a n.2). Judge Bork also declined to decide the question whether the PLO, as a non-state, should be subject to obligations imposed by international law (*id.* at 67a-69a).

of limitations, Senior Judge Robb voted to affirm the dismissal of the action on the ground that the case presented a nonjusticiable political question (Pet. App. 105a). Judge Robb reasoned that the case was not susceptible of judicial handling, involved standards that defied judicial application, and raised questions touching on sensitive matters of diplomacy that historically have been within the exclusive domain of the political branches of government (*id.* at 105a-114a).

DISCUSSION

The United States of course unqualifiedly condemns the terrorist acts that led to this lawsuit. As Judge Robb stated, "the attack on the Haifa highway amounts to barbarity in naked and unforgivable form" (Pet. App. 105a). Moreover, this case presents difficult and unresolved questions regarding the meaning and application of the alien tort statute, a rarely used and little understood provision of the Judicial Code. Nevertheless, we do not believe that the dismissal of this case is appropriate for review by this Court.

Neither the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions of the participating judges creates any clear conflict in the circuits. The only proposition for which the judgment below may fairly be read—that in the circumstances of this case, petitioners have not alleged facts sufficient to support the district court's exercise of subject matter jurisdiction under 28 U.S.C. 1331 or 1350—does not conflict with the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980). Furthermore, the existence of alternative, dispositive grounds for dismissing petitioners' suit, upon which the court of appeals did not pass,

makes this an especially inappropriate case in which to address the complex questions of domestic and international law presented in the petition.

1. Of the four questions presented for review by petitioners (Pet. i), we believe that only the first two —those addressing the contemporary meaning and proper application of the alien tort statute, 28 U.S.C. 1350—raise issues that might someday merit this Court's attention.[8] The panel's inability to agree upon a rationale for its ruling, however, coupled with the length and complexity of the three concurring opin-

[8] Petitioners' third question, regarding the applicability of the political question doctrine to cases of this kind (Pet. i, 23-27), could be significant in another case but is not properly presented here, because a majority of the panel voted to affirm the dismissal on other grounds, thereby avoiding application of the political question doctrine. See Pet. App. 48a-52a (Edwards, J., concurring); *id.* at 63a n.8, 103a-104a (Bork, J., concurring).

Nor does petitioners' fourth question, in which they ask the Court to decide whether American citizens have causes of action "arising under * * * treaties of the United States" within the meaning of 28 U.S.C. 1331, warrant review. For the reasons stated by the district court (Pet. App. 117a-122a), Judge Edwards (*id.* at 13a n.4), and Judge Bork (*id.* at 73a-78a), the United States treaties relied upon by petitioners (Pet. 27-29) are not self-executing, nor do they grant individuals the right to seek damages in domestic courts for violation of their provisions. Indeed, at least one court of appeals has held that the principal treaty relied on by petitioners (Pet. 28), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, does not provide a private right of action. *Huynh Thi Anh* v. *Levi*, 586 F.2d 625 (6th Cir. 1978). The three cases cited by petitioners (Pet. 27-29) are inapposite because each involved entirely different treaties and thus shed no light on the availability of a private cause of action to enforce the treaties at issue in this case.

ions, leaves the precise basis and scope of the court of appeals' judgment unclear. Left undisturbed, that ambiguous judgment would have little, if any, precedential value. Moreover, further review of the judgment below, without the benefit of a majority opinion, would be imprudent and premature, particularly when the complex issues of federal jurisdiction, international law, and statutory construction may well be clarified or resolved without such review (see pages 10-12, *infra*).

As noted, Judge Robb expressed no view regarding the district court's jurisdiction under the alien tort statute to hear petitioners' claims. While the divergent views of Judges Edwards and Bork (compare Pet. App. 4a-52a (Edwards, J., concurring) with *id.* at 53a-104a (Bork, J., concurring)) regarding the historical purposes of the alien tort statute and its contemporary significance may be of academic interest, they are merely dicta and do not represent the position of the District of Columbia Circuit. As a result, it is virtually "impossible to say * * * what the law of th[e] circuit is" with respect to the meaning and application of Section 1350 (Pet. App. 104a (Bork, J., concurring)).[9] Despite their substantial differences of opinion on numerous points, however, it is significant that Judges Edwards and Bork each took pains to point out that his reading of the alien

[9] Judges Edwards and Bork even disagreed about the extent of their disagreement. Although Judge Edwards identified four central propositions over which he believed he and his colleagues differed (Pet. App. 7a-8a), Judge Bork stated that, in fact, he "accept[ed] the first three [propositions] entirely and also agree[d] with the fourth, but in a more limited form" (*id.* at 98a). For his part, Judge Edwards remarked that Judge Bork "has completely misread my opinion" (*id.* at 52a).

tort statute, if adopted by the panel, would not necessarily conflict with the decision of any other circuit, including the Second Circuit's decision in *Filartiga* v. *Pena-Irala*, *supra*.[10] Absent a circuit conflict, differences of opinion arising within a single panel of the District of Columbia Circuit regarding the scope and application of a particular statute, however sharply stated, do not warrant this Court's exercise of certiorari jurisdiction.

The likelihood that the District of Columbia Circuit will itself soon be called upon to resolve these issues only reinforces the conclusion that further review of

---

[10] In *Filartiga*, the Second Circuit held that the alien tort statute conferred federal jurisdiction over a suit brought by Paraguayan nationals against a former Paraguayan police official for wrongfully causing the death of their relative in Paraguay, allegedly by the use of torture. Judge Bork concluded that *Filartiga* differs from this case in three important respects: unlike the PLO in this case, the defendant in *Filartiga*, a state official acting in his official capacity and in direct contravention of the Paraguayan constitution and laws, "was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive" (Pet. App. 97a). These factual distinctions led Judge Bork to conclude that "not all of the analysis employed here would apply to deny a cause of action to the plaintiffs in *Filartiga*" (*ibid.*). Judge Bork's quarrel with *Filartiga* was based on an issue that the Second Circuit did *not* address—the question whether international law created a cause of action that the plaintiffs before it could enforce in United States courts. Similarly, Judge Edwards "adhere[d] to the legal principles established in *Filartiga* but [found] that factual distinctions [relating to the PLO's status as a non-state actor as opposed to a person acting under color of state law] preclude[d] reliance on that case to find subject matter jurisdiction in the matter now before us" (Pet. App. 5a).

the instant case would be inappropriate. On May 24, 1984, an entirely different panel of the District of Columbia Circuit (Tamm, Ginsburg, and Scalia, JJ.) heard argument in *Sanchez-Espinoza* v. *Reagan*, No. 83-1997. In that case, Nicaraguan and European plaintiffs have attempted to invoke 28 U.S.C. 1350 to sue officials of the United States government in federal court, charging that they have been the victims of allegedly tortious acts conducted and sponsored by the United States in Nicaragua in violation of the law of nations.[11] The *Sanchez-Espinoza* panel may well produce a majority opinion that makes it possible to "say * * * what the law of [the District of Columbia] circuit is" with regard to the meaning of the alien tort statute (Pet. App. 104a (Bork, J., concurring)). Alternatively, should the *Sanchez-Espinoza* panel fail to produce a majority opinion, or should the panel members adopt interpretations of Section 1350 that partially or totally differ from those expressly by the judges in this case, the District of Columbia Circuit might be inclined to rehear the case en banc in order to resolve the question of statutory construction.

In sum, "[s]ince section 1350 appears to be generating an increasing amount of litigation" (Pet.

---

[11] In our brief on appeal in *Sanchez-Espinoza*, we have argued that the alien tort statute is purely jurisdictional and cannot be interpreted either to mandate the creation of a federal common law of international tort or to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law. See Br. for the Federal Appellees at 9, 32-40. We have also argued that the alien tort statute does not waive either the sovereign immunity of the United States or the official immunities of individual government officials from alien tort claims arising out of actions in foreign countries. See *id.* at 40-44.

App. 104a (Bork, J., concurring)),[12] we think it likely that any arguable inconsistencies between the Second Circuit's approach to the alien tort statute in *Filartiga* and the approaches taken by the panel members in this case either will be reconciled without the need for review by this Court or will ripen into a sharper conflict that would permit this Court to review the complex issues raised by the petition after they have been more fully analyzed by the lower federal courts. See, *e.g.*, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).[13]

2. Review of the issues relating to Section 1350 in the instant case would appear to be inappropriate for the additional reason that any decision rendered by this Court might not affect the result in this case. The court of appeals' affirmance of the district court's

---

[12] In addition to the District of Columbia Circuit, other federal courts also are considering claims based on the alien tort statute. See, *e.g.*, *Siderman de Blake* v. *Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984) (awarding a default judgment to Argentinian plaintiffs who claimed official torture by the Argentinian government in Argentina, predicating jurisdiction on Section 1350). We are advised that the district court is reconsidering its judgment in *Siderman de Blake* in light of the Foreign Sovereign Immunities Act.

[13] As described by Judge Edwards, the alien tort statute is "an aged but little-noticed provision of the First Judiciary Act of 1789" (Pet. App. 4a). It has been invoked only rarely in its nearly 200-year history; indeed, "[t]his old but little used section is a kind of legal Lohengrin; * * * no one seems to know whence it came." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Clearly, further elucidation by the lower courts of the issues raised in the petition would be of assistance to this Court.

dismissal of petitioners' action did not rest exclusively upon a construction of the alien tort statute. Two of the three panel members, Judges Edwards and Bork, agreed that the Foreign Sovereign Immunities Act bars the exercise of jurisdiction over Libya (see Pet. App. 4a-5a n.1 (Edwards, J., concurring); *id.* at 66a-67a n.13 (Bork, J., concurring)). That ruling, which petitioners have not challenged in this Court, is clearly correct. The "noncommercial tort" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. 1605 (a)(5), renders foreign sovereigns immune from suit for all noncommercial tortious acts except those that cause "personal injury or death, or damage to or loss of property, *occurring in the United States*" (emphasis added). See *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), cert. denied, No. 84-47 (Oct. 9, 1984); *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), cert. denied, No. 83-1890 (Oct. 9, 1984).

In addition, the court of appeals never reached or resolved the question whether petitioners ever obtained personal jurisdiction over Libya and the PLO by effecting service on them. The district court held that they did not (Pet. App. 116a n.1, 129a n.4), and petitioners have not contended otherwise in this Court. Similarly, at least one panel member agreed with the district court's holding that petitioners' allegations did not connect the remaining defendants, the Arab-American organizations, "to the claimed torts sufficiently to permit the action to proceed against them" (*id.* at 125a).[14] Finally, the court of

---

[14] Judge Edwards specifically agreed with this aspect of the district court's decision (Pet. App. 4a n.1). Judge Robb did not discuss the issue, and Judge Bork declined to pass on it

appeals never reached the district court's alternative holding that the entire action was barred by the local statute of limitations.

In these circumstances, we question whether this Court should exercise its discretionary jurisdiction to construe a statute as complex and little understood as the alien tort statute in a context in which the outcome of the case is unlikely to be affected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
RICHARD K. WILLARD
Acting Assistant Attorney General
ROBERT E. KOPP
JOHN M. ROGERS
HAROLD H. KOH
Attorneys

JANUARY 1985

(*id.* at 53a n.2, 55a n.4). Nevertheless, Judge Bork confined his jurisdictional analysis wholly to petitioners' allegations against the PLO (*id.* at 67a n.13).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10149

Office-Supreme Court, U.S.
FILED
FEB 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 83-2052 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONSE OF PETITIONERS HANOCH TEL-OREN, *ET AL.* TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN & MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	1

TABLE OF AUTHORITIES

Cases:

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	2
Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *appeal pending*, No. 83-1997	3

Statutes:

28 U.S.C. § 1350	*passim*
28 U.S.C. § 1608	4
D.C. Code Ann. § 12-301 (8)	5

Miscellaneous:

Amicus Curiae Brief for the United States in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2052

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,

v.

LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONSE OF PETITIONERS HANOCH TEL-OREN, *ET AL.* TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioners, Hanoch Tel-Oren, *et al.*, respectfully submit this Response to the Brief of the United States as Amicus Curiae.

ARGUMENT

In its Brief as Amicus Curiae ("Amicus Brief"), the United States admits that "this case presents difficult and unresolved questions regarding the meaning and application of the alien tort statute," Amicus Brief at 7, and that " 'section 1350 appears to be generating an increasing amount of litigation.' " *Id.* at 11 (citation omitted).

These considerations argue in favor of granting the writ and seemingly align the United States with the two panel members below who urged review by this Court. App. A at 4a, 104a. Surprisingly, however, the United States contends that the Petition for a Writ of Certiorari should be denied. None of the reasons offered withstands scrutiny.

The United States' principal argument is that "[n]either the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions . . . creates any clear conflict in the circuits." Amicus Brief at 7. This contention fails to recognize the practical and logical effects of the D.C. Circuit's decision, which clearly conflicts in result with that of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 836 (2d Cir. 1980). The unanimous decision by the panel affirming the District Court's dismissal of the complaint means that civilian victims of terrorism and the included acts of torture, hostage-taking and summary execution cannot, in the D.C. Circuit, successfully invoke the Alien Tort Claims Act, 28 U.S.C. § 1350, in seeking redress for such acts. It is true, of course, that the panel members disagreed as to some of the reasons for this conclusion. Despite such disagreement, the per curiam statement by the court, standing as the law of the circuit, means that section 1350 cannot be invoked for the acts alleged herein. Accordingly, a trial judge within the D.C. Circuit would be compelled to dismiss claims identical to those of petitioners. In direct contrast, the Second Circuit in *Filartiga* held that a civilian victim of torture could obtain money damages under section 1350 for injuries suffered as a result of that torture. Based on *Filartiga*, petitioners' claims would have survived a motion to dismiss had they been brought in a district court within the Second Circuit. Such a clear conflict in result certainly warrants review by this Court.

The United States' contention that the D.C. Circuit reached no reviewable decision is flawed in another re-

spect, as it ignores the holding by a majority of the panel that terrorism is not a tort in violation of the law of nations. Judge Edwards stated that "I do not believe that under current law terrorist attacks amount to law of nations violations." App. A at 46a. *See also* Amicus Brief at 5. Judge Bork agreed, stating that there is a "lack of consensus about terrorism generally, and about PLO activities in particular." App. A at 71a. This holding presents an issue not only of "academic interest," as the United States asserts, Amicus Brief at 9, but of such significance and with such ramifications, *see, e.g.*, Petition at 13, as to warrant Supreme Court review.

The United States also contends that this Court should not issue a writ because the D.C. Circuit itself, in *Sanchez-Espinoza v. Reagan*, No. 83-1997, may soon be called upon to revisit section 1350 and rule on its scope and applicability. Amicus Brief at 10-11. A careful examination of *Sanchez-Espinoza* indicates, however, that it is unlikely that the Court of Appeals will even reach such questions regarding section 1350, much less resolve them. First, the District Court in *Sanchez-Espinoza* relied only on the political question doctrine in dismissing plaintiffs' complaint, never deciding whether plaintiffs had a cause of action under section 1350. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 597-602 (D.D.C. 1983), *appeal pending*, No. 83-1997.[1] The applicability of section

---

[1] The District Court stated:

> Because we dismiss this lawsuit as non-justiciable, we do not decide whether any or all of those sources of international law create a legal foundation for the relief requested by plaintiffs. *Compare Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (torture is a violation of the law of nations that gives rise to an action for damages in federal court), *with Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981) (law of nations or treaties must provide for private right of action in order for an injured plaintiff to obtain relief in federal court under alien tort statute, 28 U.S.C. § 1350).

568 F. Supp. at 601 n.6.

1350, therefore, is not likely to be reached by the Court of Appeals, either. Second, *Sanchez-Espinoza*, unlike this case, involves an attempt to sue officials of the United States government, and thereby raises significant questions of sovereign immunity. Both the political question doctrine and the doctrine of sovereign immunity, therefore, are independent and adequate grounds upon which the D.C. Circuit may decide *Sanchez-Espinoza*. Thus, the United States is disingenuous in suggesting that the issues presented by petitioners to this Court are squarely presented in *Sanchez-Espinoza*, and that these issues are likely to be resolved by the D.C. Circuit in that case.[2]

Another argument offered by the United States is that any decision by this Court "might not affect the result in this case." Amicus Brief at 12. The United States asserts, for example, that petitioners "failed to complete service upon Libya and the PLO," *id.* at 2, 13, citing a footnote in Judge Green's opinion. As reflected in the District Court record, however, this assertion is plainly incorrect. First, the record reflects that the Clerk of the Court was instructed, pursuant to 28 U.S.C. § 1608, to mail all pleadings, previously translated into Arabic, to the Secretary of the Peoples Bureau for Foreign Affairs

---

[2] Oddly, the United States government's interpretation of section 1350, a two hundred year-old statute enacted by the First Congress, Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), has recently undergone a complete reversal. In *Sanchez-Espinoza*, the government argues that section 1350 is "purely jurisdictional" and "cannot be interpreted . . . to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law." Amicus Brief at 11 n. 11. In stark contrast, the Departments of State and Justice stated in their *amicus curiae* brief in *Filartiga* that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights," and that "private enforcement is entirely appropriate." Brief for the United States, App. C at 132a. Certainly, the availability of a remedy for those individuals whose claims fall within the scope of section 1350 should not vary every four years.

in Tripoli, Libya, for service upon the Libyan Arab Republic. Second, as also documented and reflected in the record, a special process server served the Palestine Liberation Organization on March 10, 1981, by leaving copies of the summons and complaint with a person authorized to accept service.[3] Service has been effected, therefore, as to Libya and the PLO. Furthermore, the question of service was never raised before the District Court: service was not challenged, the issue was never heard or argued, no motion was ever made, and no ruling was ever entered.

The United States, choosing to ignore the relevant statutes and case law previously cited by petitioners, *see* Petition at 6 n.2; Reply Brief at 4-7, also asserts that the statute of limitations would bar petitioners' claims. Petitioners have already demonstrated that their claims for intentional infliction of emotional distress, for intentional infliction of cruel, inhuman, and degrading treatment, and for the claims set forth in Counts II, III, and V are governed by the three-year limitations period in D.C. Code Ann. § 12-301(8). The claims of the thirty-four minors cannot be time-barred, moreover, regardless of the statute of limitations found to be applicable.

Finally, the United States relies on the Foreign Sovereign Immunities Act as a bar to this action. As outlined in the Petition, even if the Act were held to preclude an action against Libya, it would not bar suit against the PLO, which is alleged to have acted as that state's agent. *See* Petition at 17-18 n.9.[4]

---

[3] In addition to serving the PLO directly, petitioners allege that the Palestine Information Office, which also has been served, is the alter ego of the PLO.

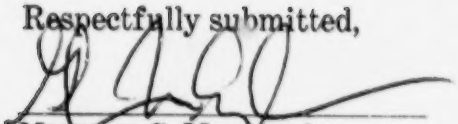
[4] Each of these arguments by the United States seems to presume that no viable defendant is present against which petitioners can litigate. This presumption ignores the fact that the National Association of Arab Americans has fully briefed this case at every level, and is an active and present defendant.

The United States contends that review is improper because the Alien Tort Claims Act is "a rarely used and little understood provision of the Judicial Code." Amicus Brief at 7. The United States' brief itself, however, illustrates that the statute's use and importance cannot be underestimated. It states, for example, that section 1350 " 'appears to be generating an increasing amount of litigation.' " *Id.* at 11 (citation omitted); *see generally, id.* at 11-12, and n.12. This case provides the Court with the immediate opportunity to define the precise nature and scope of section 1350, and to guide the lower courts as the statute is increasingly invoked. Furthermore, the United States never denies the significance of the issues presented, choosing instead to urge the Court to wait for another day to resolve them.

None of the arguments offered by the United States can mask the profound significance of the issues presented by the Petition. This case questions whether the federal courts will provide a right of redress for the ninety-five adults and twenty-six children who were all victims of state-sponsored terrorism, torture, maiming, and execution. Every day we read and hear of our government's repeated denunciations of international terrorism. Indeed, one cannot pass the White House, the Capitol, or the State Department without noticing the security measures that reflect our ever-increasing fear that we, too, will become the victims of a terrorist attack. The time is ripe, therefore, to provide the victims of a terrorist attack with an effective remedy.

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

Respectfully submitted,



MICHAEL S. MARCUS *
GLENN M. ENGELMANN
CLIFFORD J. ZATZ
JEFFREY J. PECK
SEIFMAN, SEMO, SLEVIN
& MARCUS, P.C.
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007
(202) 298-8686
Counsel for Petitioners

* Counsel of Record

Of Counsel:
JOSEF LIVNE
16 Iben Sina Street
Haifa, Israel

GEORGE B. DRIESEN
1000 Potomac Street, N.W.
Suite 204
Washington, D.C. 20007

February 6, 1985